115-464

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~885~~. 68

MRS. LAURA ELLEN JONES, WIDOW OF SIDNEY A. STOCKDALE, DECEASED, AND TESTAMENTARY EXECUTRIX AND NATURAL TUTRIX OF HER MINOR CHILDREN, PLAINTIFF IN ERROR,

vs.

WATSON VAN BENTHUYSEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 9, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 335.

MRS. LAURA ELLEN JONES, WIDOW OF SIDNEY A. STOCKDALE, DECEASED, AND TESTAMENTARY EXECUTRIX AND NATURAL TUTRIX OF HER MINOR CHILDREN, PLAINTIFF IN ERROR,

vs.

WATSON VAN BENTHUYSEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Petition for certiorari	1	1
Order for certiorari	4	2
Writ of certiorari	4	2
Marshal's return	6	3
Transcript from fourth district court	6	3
Petition	6	3
Schedule of sales of manufactured tobacco, &c.	11	5
Citation	12	5
Sheriff's return	13	6
Certiorari	13	6
Order for return to certiorari	15	6
Certificates to transcript	16	7
Answer	19	8
Statement of sales of manufactured tobacco	19	8
Admissions	21	9
Hearing and continuance	22	9
Verdict	23	10
Rule for a new trial	24	10
Order denying motion for new trial	24	10
Judgment	25	11

	Original.	Print.
Bill of exceptions	27	11
Statement	27	11
Defendant's requests	28	12
Instructions to jury	34	13
Bill of exceptions	36	14
Defendant's request	37	14
Bill of exceptions	38	15
Bill of exceptions	39	15
Clerk's certificate	41	16
Writ of error	42	16
Citation	44	17
Proof of service	45	18

1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and eastern district of Louisiana.

WATSON VAN BENTHUYSEN
versus
SIDNEY A. STOCKDALE. } No. 6870.

Petition for writ of certiorari.—Filed January 7th, 1873.

To the hon. the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of S. A. Stockdale with respect shows that he is an officer of the United States, to wit, collector of internal revenue for the first collection district of Louisiana, duly appointed and acting under an act of Congress entitled "An act to provide internal revenue to support Government, to pay interest on the public debt, and for other purposes," passed 30th June, 1864, and the acts amendatory thereof.

That a civil suit has been commenced against him in a court of
2 the State of Louisiana, to wit, in the fourth district court for the parish of Orleans, holding sessions in the city of New Orleans, by Watson Van Benthuysen, domiciled in the city of New Orleans, said suit being No. 38383 of the docket of said court, and process therein issued has been served upon petitioner, in the district of Louisiana and within the jurisdiction of this court; that no trial of the said cause has as yet been had; that the said W. Van Benthuysen seeks by the said suit to recover from petitioner the sum of twenty-five hundred and twelve dollars ($2,512) for alleged wrongful and illegal collection of internal-revenue tax on manufactured tobacco as agent for the manufacturers from 1st day of April, 1869, to 31st day of January, 1872.

The premises considered, your petitioner prays that a writ of certiorari may issue to the said fourth district court for the parish of Orleans requiring it to send to this hon. court the record and proceedings in the said cause in conformity to the 67th section of the act of Congress enti-
3 tled "An act to reduce internal taxation and to amend an act entitled an act to produce internal revenue to support the Government, to pay interest on the public debt, and for other purposes, approved 30th June, 1864, and acts amendatory thereof," approved 13th July, 1866.

(Signed) J. R. BECKWITH,
Att'y for Petitioner.

Affidavit.

S. A. Stockdale, petitioner herein, being sworn, says that all the allegations in the petition are true to the best of his knowledge and belief.

(Signed) S. A. STOCKDALE.

Sworn to & subscribed before me January 7th, 1873.

(Signed) F. B. VINOT,
U. S. Comm'r.

Certificate of counsel.

I certify that, as counsel for petitioner, S. A. Stockdale, I have examined the proceedings against him and carefully enquired into all the matters set forth in the petition, and I verily believe the same to be true.

(Signed) J. R. BECKWITH,
Att'y, &c.

4 *Order.*

Let a writ of certiorari issue as prayed for.
January 7th, 1873.

(Signed) E. H. DURELL, *Judge.*

Writ of certiorari.—Issued January 7th, 1873.

UNITED STATES OF AMERICA,
District of Louisiana, ss:

Circuit court of the United States for the fifth circuit and district of Louisiana.

The President of the United States of America to the honorable the fourth district court for the parish of Orleans, greeting:

Because it has been represented to us, in our said court, that a cause has been lately instituted and is now pending in said court wherein Watson Van Benthuysen is plaintiff, and Sidney A. Stockdale, an officer of the United States, to wit, collector of internal revenue for the first collection district of Louisiana, is defendant, said cause being represented to us as being No. 38383 of the docket of said court, and the said Sidney A. Stockdale has been served with process therein issued, and because the
5 said Sidney A. Stockdale has this day filed in our said court his petition, duly verified and certified as required by law, wherein he has complained that the said suit was and is instituted against him, so being such officer as aforesaid, for and on account of an act done by him as such officer as aforesaid, under color of his said office, administering the revenue laws of the United States, and has in due form of law prayed of us that said suit be entered on the docket of our said court and that said cause be hereafter proceeded in all respects as if the said cause had been originally commenced in our said court, and we being willing that the same shall be done, and having ordered the said cause to be entered on the docket of our said court, where the said cause is now so docketed:

We therefore command you that you do forthwith certify to us in our said court a full record of all the proceedings had and of record in your said court, in, about or concerning the said cause now remaining in
6 your said court, that said cause may be proceeded in in our said court as by the statutes of the said United States provided and required.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 7th day of January, A. D. 1873.

[SEAL.] (Signed) F. B. VINOT,
D'y Cl'k.

Marshal's return.

Received Jan'y 7th, 1873, by the U. S. marshal, and on the 9th day of same month and year served a copy of within writ of certiorari on the hon. the fourth dist. court, named herein, by handing the same to B. L. Lynch, the judge of the said court.

New Orleans, Jan'y 9th, 1873.

(Signed) S. W. REED,
D'y U. S. Marshal.

Transcript from fourth district court for the parish of Orleans.—Filed January 25th, 1882.

STATE OF LOUISIANA:

Fourth district court for the parish of Orleans.

Petition.—Filed January 3d, 1873.

WATSON VAN BENTHUYSEN
versus
7 SIDNEY A. STOCKDALE. } No. 38383.

To the honorable the fourth district court for the parish of Orleans:

The petition of Watson Van Benthuysen, who resides in New Orleans in said State, respectfully shows that Sidney A. Stockdale, residing at the same place, is indebted to your petitioner in the sum of twenty-five hundred and twelve dollars, with interest thereon, as hereinafter claimed for this, to wit:

Since the first day of March, A. D. 1869, your petitioner has been engaged in the business of commission merchant at New Orleans aforesaid; his sole business being the sale of manufactured tobacco consigned to him by the manufacturers thereof, they paying him the usual commissions upon such sales; that from the first of April, 1869, to the thirty-first day of January, 1872, both dates inclusive, his sales of manufactured tobacco, as such agent for the manufacturers thereof, amounted to the sum of seven hundred and eighty-seven thousand eight hundred and fifty-five $\frac{67}{100}$ dollars, and that upon the sale or removal for sale of said tobacco the
8 United States internal-revenue tax thereon accrued, and was paid by the purchase, affixing, and cancellation of tax-paid stamps upon the packages containing said tobacco, and the taxes so paid upon the tobacco so sold by him, during the period of time aforesaid, amounts to the sum of four hundred and sixty-eight thousand one hundred and forty-four $\frac{33}{100}$ dollars.

And Sidney A. Stockdale, being collector of United States internal revenue in and for the first collection district of the *first collection district of the* State of Louisiana, did on or about the twentieth day of each and every month, from the month of May, 1869, to the month of February, 1872, both inclusive, unlawfully and wrongfully demand from your peti-

tioner an alleged tax upon the sales of such manufactured tobacco so by him made for the manufacturers thereof and upon the tax paid thereon during the preceding month at the rate of two dollars per thousand dollars of sales, tax included, claiming that such monthly tax was due to the United States, by reason of the assessments made by B. F. Joubert,
9 assessor of United States internal revenue for said district, and to avoid threatened costs and penalties paid the sums as demanded, but under protest, to the said defendant, the total amount so paid for the period of time aforesaid being the sum of two thousand five hundred and twelve dollars.

Petitioner hereto annexes a schedule of his monthly sales of tobacco during the period aforesaid, of the tax paid thereon by stamps as aforesaid, the amount of tax demanded monthly thereon by the defendant, and the date of his payment of such taxes, and said schedule is made a part of this petition.

Petitioner avers that said tobacco was usually sold in bond, and the specific tax thereon represented by stamps was paid after such sales were made.

Your petitioner avers that said assessments and collections of said sums of money alleged to be taxes were wholly without warrant or authority in law.

Your petitioner avers that according to the provisions of law in that regard, and the regulations of the Secretary established in pursu-
10 ance thereof, "he appealed to the Commissioner of Internal Revenue for and demanded the refunding to him the aggregate sum of money, so as aforesaid wrongfully and illegally demanded and collected from your petitioner by said defendant, and said Commissioner, on the sixth day of July, A. D. 1872, rejected said demand within six months prior to the commencement of this suit.

Wherefore your petitioner prays that said defendant, Sidney A. Stockdale, be cited to answer this demand, and that after due proceedings had he be condemned to pay your petitioner the sum of twenty-five hundred and twelve dollars, with legal interest upon each separate payment, from the date of such payment, as herein set forth, until paid, and costs of suit.

And petitioner prays for general relief.

(Signed) J. D. ROUSE,
Att'y for Petitioner.

11 *Schedule of sales of manufactured tobacco made by W. Van Benthuysen, the costs of stamps affixed, and amount of tax assessed upon said sales, including stamps.*

Time embraced in each assessment month.	Sales of tobacco, less cost of stamps.	Cost of stamps affixed to tobacco.	Amount upon which tax was assessed and paid at $2.00 per M.	Am't of tax at $2 per M. assessed and paid.	Date of payment of tax.
1869.					1869.
April	13,926 08	7,073 92	21,000	42	May 24
May	5,106 88	9,893 12	15,000	30	June 25
June	8,920	16,080	25,000	50	July 26
July	34,230 40	5,679 60	40,000	80	Aug. 30
August	21,767 68	3,232 32	25,000	50	Sept. 25
September	41,409 60	3,590 40	55,000	110	Oct. 29
October	29,341 76	9,658 24	39,000	78	December 3
November	31,366 40	12,633 60	44,000	88	Dec. 30
					1870.
December	28,407 68	12,592 32	41,000	82	Jan'y 29
1870.					
Jan'y	30,393 92	19,606 08	50,000	100	M'ch 3
Feb'y	24,876 64	35,123 36	60,000	120	M'ch 31
M'ch	12,647 36	27,352 64	40,000	80	April 23
April	18,785 28	21,214 72	40,000	80	May 26
May	8,201 92	11,798 08	20,000	40	June 30
June	10,279 36	9,720 64	20,000	40	July 23
July	19,283 20	5,716 80	25,000	50	Aug. 24
Aug	4,607 67	15,392 33	20,000	40	Sept. 29
Sept	8,112 96	16,887 04	25,000	50	Oct. 28
Oct	52,975 68	12,024 32	65,000	130	Nov. 30
Nov	28,912 72	29,577 28	58,490	116	Dec. 28
					1871.
Dec	27,907 84	15,092 16	43,000	86	June 27
1871.					
Jan'y	25,083 20	15,916 80	41,000	82	Feb'y 25
Feb'y	28,904 48	17,095 52	46,000	92	M'ch 28
M'ch	13,797 76	18,802 24	32,600	65	Ap'l 27
April	17,707 36	11,192 64	28,900	58	May 29
12 May	16,072 64	8,927 36	25,000	50	June 29
June	14,316 32	11,383 68	25,700	51	July 29
July	23,564 96	10,935 04	34,500	69	Aug. 31
Aug	12,327 68	2,872 32	15,200	30	Sept. 26
Sept	28,048 80	10,651 20	38,700	77	Oct. 30
Oct	42,437 76	23,562 24	66,000	132	Nov. 25
Nov	33,354 48	10,645 52	54,000	108	Dec. 23
					1872.
Dec	27,683 52	5,716 48	33,400	66 80	Jan'y 29
1872.					
Jan'y	39,185 68	8,414 32	47,600	95 20	Feb'y 23
				$2,512	

Citation.

STATE OF LOUISIANA:

Fourth district court, for the parish of New Orleans, in the city of New Orleans.

WATSON VAN BENTHUYSEN *vs.* SIDNEY A. STOCKDALE. } No. 38383.

Mr. SIDNEY A. STOCKDALE:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your

answer to the same in the office of the clerk of the fourth district court for the parish of Orleans in ten days after the service hereof.

Witness the honorable B. L. Lynch, judge of the said court, the
13 3d day of January, in the year of our Lord 1873.

(Signed) A. F. LYND,
Deputy Clerk.

Sheriff's return.

On the 4th day of same month and year served a copy of within citation and accompanying petition on defendant herein, Sidney A. Stockdale, in person.

Ret. same day.

(Signed) HENRY BENIT, *D'y Sh'ff.*

Filed January 6th, 1873. (Signed) A. F. Lynd, d'y cl'k.

UNITED STATES OF AMERICA,
District of Louisiana:

Circuit court of the United States, for the fifth circuit and district of Louisiana.

The President of the United States of America to the honorable the fourth district court for the parish of Orleans, greeting:

Because it has been represented to us in our said court that a cause has been lately instituted and now is pending in said court, wherein Watson Van Benthuysen is plaintiff, and Sidney A. Stockdale, an officer of
14 the United States, to wit, collector of internal revenue for the first collection district of Louisiana, is defendant, said cause being represented to us as being No. 38383 of the docket of said court, and that the said Sidney A. Stockdale has been served with process therein issued, and because the said Sidney A. Stockdale has this day filed in our said court his petition, duly verified and certified as required by law, wherein he has complained that the said suit was and is instituted against him, so being such officer as aforesaid, for and on account of act done by him as such officer as aforesaid, under color of his said office, administering the revenue laws of the United States, and has, in due form of law, prayed of us that said suit be entered on the docket of our said court, and that the said cause be hereafter proceeded in all respects as if the said cause had been originally commenced in our said court, and we being willing that the same shall be done, and *and* having ordered the said
15 cause to be entered on the docket of our said court, where the said cause is now so docketed:

We therefore command you that you do forthwith certify to us in our said court a full record of all the proceedings had and of record in your said court in, about, or concerning the said cause now remaining in your said court, that said cause may be proceeded in in our said court, *and* by the statutes of the said United States provided and required.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 7th day of January, A. D. 1873.

(Signed) F. B. VINOT,
Dy. Clerk.

Filed January 9th, 1873. (Signed) Oscar Arroyo, d'y cl'k.

Extract from the minutes.

THURSDAY, *January 9th*, 1873.

Present, Hon. B. L. Lynch, judge, ex propria mortu.

It is ordered by the court that the obedience of a writ of certiorari
16 issued by the hon. the circuit court of the United States for the fifth circuit and district of Louisiana, that a certified copy of the record of the proceedings had and of record in this case be transmitted to the said circuit court of the United States for the fifth circuit and eastern district of Louisiana in order that said case be proceeded in said court, as provided by the statutes of the United States.

Certificates.

I, Edward De Blois, clerk of the fourth district court for the parish of Orleans, do hereby certify that the above and foregoing nine pages do contain a full, correct, and complete transcript of the record, including all proceedings had, documents filed, testimony and evidence adduced on the trial of the cause wherein Watson Van Benthuysen is plaintiff and Sidney A. Stockdale is defendant, which said cause was instituted in the fourth district court for the parish of Orleans on the day of , 187 , under number 38383.

17 In testimony whereof I have hereunto set my hand and affixed the seal of said court at the city of New Orleans this 17th day of January, 1873, and of the Independence of the United States of America the 97th year.

[SEAL.] (Signed) ED. DE BLOIS, *Clerk.*

I, B. L. Lynch, sole judge of the fourth district court for the parish of Orleans, do certify that Edward De Blois is clerk of said court; that the same is a court of record having common-law jurisdiction; that the signature Edward De Blois to the foregoing certificate in the proper handwriting of him, the said Edward De Blois; that to his official acts as such full faith and credit are due and owing; and I further certify that the said attestation is in due form of law.

Given under my hand at the place and on the day and date aforesaid.

(Signed) B. L. LYNCH,

Judge of the Fourth District Court for the Parish of Orleans.

18 I, Edward De Blois, clerk of the fourth district court for the parish of Orleans, do hereby certify that the honorable B. L. Lynch is the sole judge of said court, duly commissioned, qualified, and sworn, acting and presiding as such, and that the signature "B. L. Lynch" to the foregoing certificate is in the proper handwriting of him, the said hon'ble B. L. Lynch.

In testimony whereof I have hereunto set my hand and affixed thereto the seal of said court, at the city of New Orleans, this 17th day of January, A. D. 1873, and of the Indepen'ce of the United States of America the 97th.

[SEAL.] (Signed) ED. DE BLOIS, *Clerk.*

19 *Answer.—Filed April 2d, 1873.*

U. S. circuit court, fifth circuit and district of Louisiana.

W. VAN BENTHUYSEN
vs.
SIDNEY A. STOCKDALE. } No. 6870.

Now comes the defendant, and for answer to plaintiff's petition denies all and singular the allegations therein contained, and prays to be hence dismissed, with costs.

(Signed) J. R. BECKWITH,
U. S. Att'y for Def't.

Document.—Filed December 11th, 1877.

Sales of manufactured tobacco by W. Van Benthuysen.

April, 1869,	$21,000	@ $\frac{1}{5}$ of 1 %		$42		
May,	" 15,000	"		30		
June,	" 25,000	"		50		
July,	" 40,000	"		80		
Aug.,	" 25,000	"		50		
Sept.,	" 55,000	"		110		
Oct.,	" 39,000	"		78		
Nov.,	" 44,000	"		88		
Dec.,	" 41,000	"		82		
	$305,000			$610		
20 Jan'y, 1870,	$50,000	@ $\frac{1}{5}$ of 1 %		$100		
Feb'y,	" 60,000	"		120		
M'ch,	" 40,000	"		80		
April,	" 40,000	"		80		
May,	" 20,000	"		40		
June,	" 20,000	"		40		
July,	" 25,000	"		50		
Aug't,	" 20,000	"		40		
Sept'r,	" 25,000	"		50		
Oct'r,	" 65,000	"		130		
Nov.,	" 3,491	"		6	98	
Dec'r,	" 43,000	"		86		
	$411,491			$822	98	
Jan'y, 1871,	$41,000	@ $\frac{1}{5}$ of 1 %		$82		
Feb'y,	" 46,000	"		92		
Mc'h,	" 32,600	"		65	20	
April,	" 28,900	"		57	80	
May,	" 25,000	"		50		
June,	" 25,700	"		51	40	
July,	" 34,500	"		69		

Aug't,	"	15,200	"	.....	30	40
Sept.,	"	38,700	"	.....	77	40
Oct.,	"	66,000	"	.....	132	
Nov.,	"	54,000	"	.....	108	
Dec'r,	"	33,400	"	.....	66	80
		$441,000			$882	

Jan'y, 1882, $47,000, @ $\frac{1}{5}$ of 1 %..... $94 00

21 RECAPITULATION.

Sales in 1869,		$305,000	@ $\frac{1}{5}$ of 1 %	.....	$610	
"	" 1870,	411,491	"	.....	822	98
"	" 1871,	441,000	"	.....	882	
"	" 1872,	47,000	"	.....	94	
		$1,204,491			$2,408	98

OFFICE OF U. S. INT. REV.,
Oct. 19th, 1877.

I hereby certify that the above is a true copy of the assessment lists now on file in this office.

(Signed) HENRY ABEL,
D'y Coll'r Int. Rev.

Admission.—Filed June 13th, 1882.

UNITED STATES ATTORNEY'S OFFICE,
Eastern District of Louisiana:

It is admitted that during period from M'ch 1st, 1869, to January 31st, 1872, plaintiff in his account sales of tobacco rendered to his consignors, credited them with gross sales of tobacco and charged them with amount by him expended for purchase of stamps affixed to such tobacco and with his commissions on am't of gross sales.

22 *Hearing and continuance.—Extract from minutes. April term*, 1882.

NEW ORLEANS, *Wednesday, June 13th*, 1882.

Court met pursuant to adjournment. Present, Hon. E. C. Billings, district judge.

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE. } No. 6870.

This cause came on for trial—J. D. Rouse, for plaintiff; A. H. Leonard, U. S. att'y, for defendant—when the following named jurors were sworn to well and truly try the issue joined herein:

1, J. J. Walsh; 2, E. C. Baxter; 3, T. H. Handy; 4, J. Tuyes, jr.; 5, S. Renaud; 6, J. Sombsthay; 7, J. Bertrand; 8, H. Bienvenu; 9, C. A. Miltenberger, jr.; 10, H. Hart; 11, F. Carpenter; 12, A. G. Gardner.

And the panel being complete the trial was proceeded with, and after hearing the pleadings and the evidence, it was ordered by the court that the cause be continued until to-morrow at 11 a. m.

23 *Verdict.—Extract from the minutes of June 14th, 1882.*

WATSON VAN BENTHUYSEN
vs.
SIDNEY A. STOCKDALE. } No. 6870.

This cause, as continued from yesterday, came on to be heard further, and the said counsel for the parties respectively as well as the said jurors in the cause being all present, the trial was proceeded with, and after hearing further evidence and the arguments of counsel, and receiving a charge from the court, Thomas H. Handy was appointed foreman of the jury, and they retired to deliberate upon their verdict. After due deliberation the said jurors returned into court and then and there through said foreman rendered and delivered the following verdict:

We, the jury, find verdict for plaintiff in sum of $936.28 with interest as prayed for in petition.

THOMAS H. HANDY,
Foreman.

24 Whereupon it is ordered that said verdict be recorded and it is done accordingly.

Rule for a new trial.—Entered and filed June 15th, 1882.

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE, COLLECTOR. } No. 6870.

On motion of A. H. Leonard, U. S. attorney, and on suggestion to the court that the verdict of the jury is contrary to the law and the evidence, it is ordered that defendant show cause on Friday, June 16th, at 11 o'clock a. m., why said verdict should not be set aside and a new trial granted herein.

Order new trial refused.—Extract from the minutes of June 16th, 1882

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE, COLL'R. } No. 6870.

This cause came on to be heard on the motion of the defendant
25 for a new trial and was argued and submitted. On consideration whereof it is ordered that said motion be overruled and a new trial refused in the premises.

Judgment.—Extract from judgment book, April term, 1882.

NEW ORLEANS, *Wednesday, June 14th*, 1882.

Court met pursuant to adjournment. Present, Hon. E. C. Billings, district judge.

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE. } No. 6870.

By reason of the verdict of the jury herein, and in accordance therewith, it is ordered, adjudged, and decreed that Watson Van Benthuysen do have and recover from Mrs. Laura Ellen Jones, widow of Sidney A. Stockdale, deceased, and testamentary executrix and natural tutrix of her minor children, the sum of nine hundred and thirty-six $\frac{28}{100}$ dollars, with interest at the rate of five per cent. per annum until paid upon $111.27 from October 29th, 1869, and upon $234.93 from April 23d, 1870,
26 and upon $162.46 from October 28, 1870, and upon $218.02 from April 27, 1871, and upon $112.92 from October 30th, 1871, and upon $96.68 from February 23, 1872, and costs of suit.

And, considering that the said S. A. Stockdale was in his life-time collector of internal revenue for the 1st collection district of the State of Louisiana, and that this action was brought against him in his official and representative capacity for money unlawfully exacted and collected from plaintiff, and by him paid into the Treasury of the United States in the performance of his official duty as such collector of internal revenue, it is ordered that no execution or other writ for the enforcement of this decree issue against the said defendant, Laura Ellen Jones, widow of Sidney A. Stockdale, but that the sum be paid out of the proper appropriation from the Treasury of the United States, as provided by law in such cases.

Judgment rendered June 14th, 1882.

Judgment signed June 16th, 1882.

(Signed) EDWARD C. BILLINGS, *Judge*.

27 *Bill of exceptions.—Filed June 10th*, 1882.

U. S. circuit court, eastern district of Louisiana.

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE, COLLECTOR. } No. 6870.

Be it remembered that on the trial of the above cause, there being evidence tending to show that plaintiff, during the period mentioned in his petition, was a dealer in manufactured tobacco, selling tobacco consigned to him; that he made sworn returns as required by law showing gross amount of sales of tobacco by him made during said period, protesting at the time each return was made that cost of stamps affixed to tobacco after his sale thereof should not be included in such returns, and that he rendered to his consignors account sales wherein he credited them with gross amount of sales, and charged against them cost of stamps purchased and affixed to

tobacco sold and commissions on gross amount of sales, including therein amount paid for stamps.

28 That said tobacco was in a bonded warehouse standing in name of plaintiff, that he sold the same before paying the tax thereon, and afterwards withdrew some for consumption, purchased for and affixed thereto stamps prior to its withdrawal.

The case presenting the same facts and issue as are set forth in Jones vs Van Benthuysen, 13th Otto 87, except that the defendant introduced as additional testimony the returns of the plaintiff made by him monthly to the Internal Revenue Department, tending to show that the stamps had been affixed to the tobacco at the time of the sale thereof, and the plaintiff testified positively that the stamps were not affixed at the time of the sales of the tobacco so made by him, but that he was compelled by the officer of Internal Revenue Department to return said stanps so affixed.

And thereupon counsel for defence asked the court to give the following charges.

1st. Plaintiff cannot be allowed to contradict his own returns; and if the jury find from the evidence that as shown by such returns,

29 pl'ff's gross sales of tobacco amounted to $1,256,000.00, then he was properly charged with tax thereon imposed; say, $\frac{1}{5}$ of 1 % = $2,512.00.

2d. If the jury find from the evidence that the tobacco sold by pl'ff was tobacco on which tax had been paid, then the tax so paid entered into and formed part of the value of such tobacco and the amount thereof cannot be deducted from gross sales subject to tax of $\frac{1}{5}$ of 1 %.

3d. During period mentioned in pl'ff's petition, viz, from March 1, 1869, until January 31st, 1872, tobacco entered in U. S. bonded warehouses could not be sold until tax thereon had been paid and stamps thereto affixed, except in case of a transfer in bond when purchasers substituted his bond for that originally given and transfer was thereupon entered on the warehouse books, in which case tax remained unpaid, and if the jury found from the evidence that plaintiff sold tobacco in bond, then he, plaintiff, could not have been charged with or paid any tax which

30 included any percentage on stamps or tobacco. And if the jury find from the evidence that the tobacco sold by plaintiff was not sold in bond, then he could have sold only tobacco on which tax had been paid and to which stamps had been affixed, and was properly charged with tax on the gross amount of his sales, including amount paid for stamps affixed to the tobacco.

4th. During period set forth in pl'ff's petition tobacco entered in U. S. bonded warehouse could be therefrom withdrawn only—

1st. For export.
2d. ". removal to some other bonded warehouse.
3d. " consumption.

In case of withdrawal for export or for removal no tax was paid or due, but tobacco could not be withdrawn for consumption until tax had been paid thereon and stamps thereto affixed and cancelled by the owner, or by his agent to whom same had been consigned, and if the jury found from the evidence that the tobacco entered by plaintiff in warehouse was

31 withdrawn by him for consumption, then the tax thereon must have been paid by him, and the amount thereof cannot be deducted from

his gross sales in determining the amount due by him on sales of tobacco.

5th. That excepting only a transfer in bond during period mentioned in pl'ff's petition, the law prohibited the sale of or purchase of tobacco on which tax had not been paid, and in the action pl'ft cannot be permitted to prove a violation of law on his part by proving sale of tobacco (sold otherwise than in bond) on which tax had not been paid.

That during period mentioned in plaintiff's petition, internal-revenue stamps could be sold only by collectors of internal revenue of the U. S. That the law prohibited the sale of any tobacco stamps to plaintiff except such as were required for payment of tax on tobacco owned by him held as consignee for the owner. That the plaintiff could not have been a dealer in stamps, and could not have sold any stamps separate
32 from tobacco to which same had been attached.

6th. If upon a sale of chattels anything remains to be done as between vendor and vendee before the goods are delivered, a present right of property does not attach in the vendee, and as plaintiff's vendees, except in case of a transfer in bond, could not have possession of tobacco until stamps were affixed and withdrawal effected by plaintiff, the ownership remained in plaintiff until this was done, and he must have sold tobacco on which he had paid tax.

7th. That the gross amount of sales of tobacco made by pl'ff was the proper basis on which to calculate the tax due by him as a dealer in tobacco, and if the jury find from the evidence that the gross sales made by plaintiff amounted to $1,256,000.00, then the tax assessed against and collected from him was properly assessed and collected.

8th. When stamps are attached to tobacco and the tobacco then sold, the dealer in tobacco who sold same is liable to tax on the gross
33 amount of sales.

9th. If the jury find from the evidence that the gross amount received by plaintiff for tobacco sold during period set forth in his petition amount to $1,256,000 including $468,144.33 am't of stamps attached to such tobacco; that plaintiff on his books credited his consignors with the sum of $1,256,000 as the amount received by him for them for tobacco by him sold; that he charged against said consignors sums by him expended for them for stamps on such tobacco to amount of $468,144.33 and also his commissions on gross sales, viz, on $1,256,000.00; that for said period plaintiff returned to U. S. assessor the sum of $1,256,000.00 as amount of sales tobacco by him made; that plaintiff purchased from the collector of internal revenue the stamps attached to such tobacco, and himself affixed and cancelled same; that plaintiff withdrew said tobacco from bonded warehouse for consumption after stamps had been so affixed, and that the tobacco was not delivered by plaintiff until after same had been by
34 him so withdrawn—then the plaintiff was properly charged with and owed to the Government the amount of tax assessed against and collected from him.

That the court gave the jury the 1st and 7th instructions as requested, and refused to give the remaining instructions as requested and set forth herein, but gave instead thereof, instructions as follows:

Undoubtedly this statute, which is to control you, only intended to impose a tax upon the sales of tobacco, and if the dealer was also the owner

of stamps to be used in paying the duties on tobacco, he could sell them separately in any quantity without being liable to a tax for such sale.

When unattached to the tobacco they do enter into its value, and they can be bought and sold at their face value as an independent commodity to be used when and wherever the purchaser choose to do so.

For such sales no tax is imposed upon the seller or the buyer.

35 On the other hand, we are of opinion that when they are once attached to the tobacco and cancelled, and can never be lawfully used again, they cease to have any separate and independent value and that which they had previously has become merged into that of the tobacco. All subsequent sales are made upon the basis of the increased value the tobacco has acquired by the payment of the stamp duty and can never be estimated apart from this.

It would seem to follow from this that if the stamps for which the plaintiff was charged by the collector were not affixed to the tobacco at the time he made the sale, no tax should be charged him for that value. On the other hand if the stamps were affixed at the time of the sale they, then, entered into the value of the tobacco purchased, and the broker who made the sale should be taxed on the price of the tobacco as it was sold.

That they, the jury, were to determine the issue in the case from and according to the evidence in the case; that so far as the requests of the

36 counsel for the defendant referred to acts of the plaintiff which had been proved, the jury were to deal with them as facts in the case. To each and every refusal to find any of said instructions, and to the instruction given instead thereof the counsel for the defendant then and there, and before the jury retired to deliberate upon their verdict, excepted; and since these matters do not appear of record, has presented this bill of exceptions and asks that the same may be allowed and signed; which is done accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of exceptions.—Filed June 16th, 1882.

Circuit court.

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE, COLL'R. } No. 6870.

Be it remembered that on the trial of this cause defendant filed in evidence an admission of plaintiff to the effect that the account sales rendered

by him to his consignors he had credited them with gross amount

37 of sales of tobacco by him made for them, and had charged against them the amount expended by him for purchase of stamps affixed by him to tobacco so sold, and also with commissions on gross amount of sales, including thereon costs of stamps.

And counsel for defendant thereupon moved the court to exclude from the jury all evidence tending to show that plaintiff did not as agent of *her* consignors purchase and affix stamps to tobacco by him sold during period mentioned in his petition, on the ground that it is against good morals and public policy to permit plaintiff to show that the accounts rendered by plaintiff to his consignors were false.

Which motion was overruled by the court; and the counsel for the defendant then and there excepted to the refusal of the court so to exclude said testimony; and since these matters do not appear of record, has presented this his bill of exceptions, and prays that the same may be allowed; which is done accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

38 *Bill of exceptions.—Filed June 16th, 1882.*

U. S. circuit court.

W. VAN BENTHUYSEN *vs.* S. A. STOCKDALE, COLL'R. } No 6870.

Be it remembered that on the trial of said cause defendant's counsel objected to the reception of any evidence tending to show that during period mentioned in plaintiff's petition, he, plaintiff, sold for consumption any tobacco on which tax had not been paid and to which stamps had not been affixed, on the ground that such sales were prohibited by law, and plaintiff cannot be permitted to prove a violation of law on his part for the purpose of attempting to establish his demands.

Which objection was overruled by the court and evidence admitted showing that he sold tobacco in the bonded warehouse, and after such sales purchased and affixed tax-paid stamps to the same before its withdrawal from the warehouse, but after its sale.

39 To which ruling defendant excepted, tenders this bill of exception, and asks that same be signed and made of record.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of exceptions.—Filed September 22d, 1882.

Circuit court E. district Louisiana.

W. VAN BENTHUYSEN *vs.* S. A. STOCKDALE, COLL'R. } No. 6870.

Be it remembered that on trial of said cause defendant objected to the reception of any evidence tending to contradict the sworn returns made by plaintiff of gross sales of tobacco made by him, on the ground that plaintiff cannot be permitted to contradict his sworn returns in the absence of any allegation of error or fraud.

Which objection was overruled by the court and evidence received; and counsel for defendant then and there excepted to the refusal of the court to exclude such evidence, and since these matters do not appear of record has presented this his bill of exceptions, and prays that same may

40 be allowed and signed; which is accordingly done.

(Signed) EDWARD C. BILLINGS, *Judge.*

41 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 41 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Watson Van Benthuysen vs. S. A. Stockdale, collector, No. 6870 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 2d day of October, A. D. 1882.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 2d day of October, A. D. 1882.

EDWARD C. BILLINGS, *Judge.*

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between W. Van Benthuysen and Mrs. Laura Ellen Jones, widow of Sidney A. Stockdale, deceased, and testamentary executrix and natural tutrix of her minor children, a manifest error hath happened, to the great damage of the said Mrs. Laura Ellen Jones, widow of Sidney A. Stockdale, deceased, and testamentary executrix and natural tutrix of her minor children, as by her complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therewith given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable , Chief Justice of the said Supreme Court of the United States, this 22d day of September, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

43 (Indorsed:) United States circuit court, No. 6870. Mrs. Laura Ellen Jones, widow of Sidney A. Stockdale, &c., &c., plaintiff in error, versus Watson Van Benthuysen, defendant in error. Writ of error. Filed Sept. 22, 1882. T. V. Coupland, d'y clerk.

44 THE UNITED STATES OF AMERICA:

Circuit court of the United States, eastern district of Louisiana.

The President of the United States to Watson Van Benthuysen, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, wherein Mrs. Laura Ellen Jones, widow of Sidney A. Stockdale, deceased, and testamentary executrix and natural tutrix of her minor children, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Mrs. Laura Ellen Jones, widow, &c., &c., &c., as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22nd day of September, in the year of our Lord one thousand eight hundred and eighty-two.

EDWARD C. BILLINGS,
Judge.

45 (Indorsed:) United States circuit court, No. 6870. Mrs. Laura Ellen Jones, widow of Sidney A. Stockdale, &c., &c., plaintiff in error, vs. Watson Van Benthuysen, defendant in error. Citation.

Marshal's return.

Received Sep. 22, 1882, by the U. S. marshal, and on October 2d, 1882, I served a true copy of the within citation on Watson Van Benthuysen by handing the same to him in person, at his domicile, corner St. Charles & Eighth sts., in this city.

Oct. 2, '82.

J. DEVONSHIRE,
D'y Marshal.

STATE OF LOUISIANA,
City of New Orleans, ss:

Joseph Devonshire, a deputy marshal, being duly sworn, says, that the service and return on the reverse hereof is true and correct.

JOSEPH DEVONSHIRE.

Sworn to & subscribed this 3d day of October, A. D. 1882, before me.

J. A. CHARBONNET,
Commissioner U. S. Circuit Court, Eastern District of La.

(Indorsement on cover:) No. 335. Mrs. Laura Ellen Jones, widow of Sidney A. Stockdale, deceased, and testamentary executrix and natural tutrix of her minor children, plaintiff in error vs. Watson Van Benthuysen. E. Louisiana, C. C. U. S. Filed 9th October, 1882.

(Stamp:) Office Int. Rev. Law div. sec. Received Oct. 6, 1882.

116-464

Supreme Court U. S.
FILED.
OCT 19 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 68.

LAURA ELLEN JONES, WIDOW, ETC., *Plaintiff in Error,*

versus

WATSON VAN BENTHUYSEN, *Defendant in Error.*

Brief of J. D. Rouse and Wm. Grant, in behalf of Defendant in Error.

J. D. ROUSE,
WILLIAM GRANT,
Attorneys for Deft. in Error.

NEW ORLEANS, October 14, 1885.

A. D. HOFELINE, Brief Printer, 123 Chartres St.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 68.

LAURA ELLEN JONES, WIDOW, ETC., *Plaintiff in Error*,

versus

WATSON VAN BENTHUYSEN, *Defendant in Error.*

Brief of J. D. Rouse and Wm. Grant, in behalf of Defendant in Error.

STATEMENT OF THE CASE.

The defendant in error, and plaintiff below, was engaged in selling manufactured tobacco at New Orleans. The tobacco which he sold was shipped to New Orleans in bond, consigned to the Collector of Internal Revenue, and there placed in an export bonded warehouse.

All his sales were in bond, the tax paid stamps being purchased and affixed *after* the sales were made. He was assessed a special tax as a dealer in tobacco, and also monthly a tax of two dollars per

thousand upon the amount of his sales,* in which amount the assessor included the tax paid by stamps as aforesaid, thus assessing him both upon the amount of his sales of tobacco, and upon the tax paid thereon after the sale was made. The taxes were so assessed and paid under protest; appeal was made to the Commissioner of Internal Revenue for the refunding thereof, which was refused; and this suit for recovery thereof, brought in due time.

The defendant having died *pendente lite*, the suit was revived against the present plaintiff in error.

The case came before this Court on writ of error, and was heard and decided at the October Term, 1880, and is reported in 103 U. S., R. p. 87. The judgment in favor of the plaintiff was then reversed and a *venire de novo* awarded, because the court was unable to determine whether the plaintiff's sales of tobacco in bond were made before or after payment of the tax thereon.

The plaintiff again recovered judgment in the court below for amount of tax imposed as a tax upon sales, upon the stamps, purchased and affixed to tobacco, after his sale thereof.

ARGUMENT.

1. The principles of law which govern this

*Act July 20, 1868, sec. 59, 15 stat. I. 152.

case were laid down when it was here before, and are reported in 103 U. S. 87. Without notice of the errors assigned, we must anticipate them.

The record contains four bills of exceptions reserved by the defendant below. The first begins at p. 11 of the record, and contains a series of instructions asked by defendant, and those given to the jury.

The exception was "to each and every refusal to find any of said instructions, and to the instruction given instead thereof." The entire series of propositions was presented by defendant as one request, and if any one proposition was unsound, the exception cannot be maintained. *Beaver* v. *Taylor et al.* 93 U. S. 46. Several instructions asked are subject to criticism, but the fifth one was clearly untenable, because directly opposed to the ruling of this court in this very case. "If it was intended to save an exception as to distinct propositions, embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed." *Moulor* v. *Am. Life Ins. Co.*, 111 U. S. R. 335.

So as to the charge given, the general exception thereto "did not direct the attention of the court to the particular portions of it, to which the defendant objected. It therefore raises no question

for review by this court." *Burton* v. *West, Jersey, Ferry & Co.*, 114 U. S. 474; *Conn. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 261.

The charge given (excepting the last sentence), was copied from the opinion of this court in this cause; (103 U. S. R. 88, 89), covered the whole case, and properly submitted it to the jury. When this is done, it is settled law in this court, that the court below may refuse to give further instructions. *Ind. and St. Louis R. R. Co.* v. *Horst*, 93 U. S. 291.

2. Another reception reserved by defendant, (R. p. 14), was to the refusal of the court to exclude from the jury certain evidence which defendant conceived tended to show that plaintiff's accounts rendered to his consignors were false. The defendant's conception was based upon the plaintiff's admission that he charged his consignors with the cost of tax paid stamps, purchased by him, and charged commissions thereon. How the evidence objected to tended to the conclusion alleged by defendant; or if it did, how it could affect the issues in this case, we are unable to perceive, and so, apparently, was the court.

The evidence which defendant moved the exclusion of, had been received without objection, and it was discretionary with the trial court, after it was in, to grant or deny the motion. *Pontius* v. *People*

of New York, 82 N. Y. 347; *Marks* v. *King*, 64 N. Y. 628.

3. A third exception (R. p. 15), was to the admission of evidence upon the trial, showing that plaintiff sold tobacco in bonded warehouse, upon which the tax was paid and stamps affixed, *after its sale.* The ruling is in accordance with the opinion of this court herein, "that the owner of tobacco in a bonded warehouse might have sold it without any stamps on it, as the law did not require the stamps to be affixed until it was about to be removed." 103 U. S. 89.

4. Defendant also objected to the admission of *any* evidence on the trial tending to contradict sworn returns of plaintiff of gross sales of tobacco made by him, in absence of any allegation of error or fraud. The bill states that the "objection was overruled, *and evidence* received." R. p. 15. It does not show *what* evidence was received, nor that any particular evidence was objected to. There was no issue involving the truth or falsity of plaintiff's returns. But it does appear by the recitals of the bill of exceptions on page 11 of the record, that plaintiff did make returns, each time protesting that the cost of stamps affixed to the tobacco after the sale thereof, should not be included in such returns. The objection was therefore without foundation, and was properly overruled.

This case was remanded for the purpose of ascertaining whether the plaintiff's sales were made in bond *before* the tax was paid and stamps affixed to the tobacco; it being held, that in that event plaintiff was entitled to recover. That fact now appears, and the judgment in his favor should be affirmed.

Respectfully submitted,

J. D. ROUSE,

WILLIAM GRANT,

Attorneys for Deft. in Error.

NEW ORLEANS, October 14, 1885.

115-464

Office Supreme Court U. S.
FILED
OCT 28 1885
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

MRS. LAURA ELLEN JONES, WIDOW of Sidney A. Stockdale, deceased, and testamentary executrix and natural tutrix of her minor children, plaintiff in error,

vs.

WATSON VAN BENTHUYSEN.

No. 68.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

MRS. LAURA ELLEN JONES, WIDOW of Sidney A. Stockdale, deceased and testamentary executrix and natural tutrix of her minor children, plaintiff in error,
vs.
WATSON VAN BENTHUYSEN.
No. 68.

BRIEF FOR THE UNITED STATES.

This case comes before the court on appeal from the circuit court of the United States for the eastern district of Louisiana. The suit was originally brought by Watson Van Benthuysen against Sidney Stockdale, an officer of the United States, to wit, collector of internal revenue for the first collection district of Louisiana, duly appointed and acting under an act of Congress entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," passed 30th of June, 1864, and the acts amendatory thereof.

The object of the suit was to recover from the defendant the sum of $2,512 for alleged wrongful and illegal collection of internal-revenue tax on manufactured tobacco, as agent for the manufacturers, from the 1st day of April, 1869, to the 31st day of January, 1872.

Upon the application of the defendant a writ of *certiorari* was issued to the State court of Louisiana, in which the suit was instituted, requiring it to send to the circuit court of the United States for the fifth circuit and district of Louisiana the record and proceedings in the said cause, in conformity to the sixty-seventh section of the act of Congress entitled "An act to reduce internal taxation, and to amend an act entitled 'An act to produce internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' approved 30th of June, 1864, and acts amendatory thereof, approved 13th of July, 1866."

The petition alleged that, since the 1st day of March, 1869, the petitioner had been engaged in the business of commission merchant at New Orleans, his sole business being the sale of manufactured tobacco consigned to him by the manufacturers thereof, they paying him the usual commissions upon such sales; that from the 1st of April, 1869, to the 31st day of January, 1872, both dates inclusive, his sales of manufactured tobacco as such agent for the manufacturers thereof amounted to the sum of $787,855.67, and that upon the sale or removal for sale of said tobacco the United States internal-revenue tax thereon accrued, and was paid by the purchase, affixing, and cancellation of tax-paid stamps upon the packages containing said tobacco, and that the taxes so paid upon

the tobacco so sold by him during the period of time aforesaid amounted to the sum of $468,144.33.

It complained that the said Sidney Stockdale, being collector of United States internal revenue in and for the first collection district of the State of Louisiana, did, on or about the 20th day of each and every month, from the month of May, 1869, to the month of February, 1872, both inclusive, unlawfully and wrongfully demand from the petitioner an alleged tax upon the sales of such manufactured tobacco sold by him for the manufacturers thereof, and upon the tax paid thereon during the preceding month at the rate of $2 per $1,000 of sales, tax included, claiming that such monthly tax was due to the United States by reason of the assessments made by the internal-revenue assessor of the United States for said district, and that to avoid the threatened costs and penalties he paid the sums as demanded, but under protest, to the said defendant, the total amounts so paid for the period of time aforesaid being the sum of $2,512.

The petition further averred that said tobacco was usually sold in bond, and the specific tax thereon represented by the stamps was paid after such sales were made; that said assessments and collections of said sums of money alleged to be taxes were wholly without warrant or authority in law, and that according to the provisions of law in that regard, and the regulations of the Secretary in pursuance thereof, he appealed to the Commissioner of Internal Revenue for, and demanded the refunding to him of, the aggregate sum of money so as aforesaid wrongfully and illegally demanded and collected from the petitioner by the defendant, and that the said Commissioner, on the

6th day of July, 1872, rejected said demand within six months prior to the commencement of the suit.

At the April term, 1882, the cause came on for trial, and the jury found a verdict for the plaintiff in the sum of $936.28, with interest. The district attorney having submitted a motion for a new trial, on the ground that the verdict was contrary to the law and the evidence, the same was overruled by the court, and a new trial denied.

On the 14th of June, 1882, the court adjudged, ordered, and decreed that Watson Van Benthuysen do have and recover from Mrs. Laura Ellen Jones, widow of Sidney Stockdale, deceased, and testamentary executrix and natural tutrix of her minor children, the sum of $936.28, with interest at the rate of 5 per cent. per annum until paid upon $111.27 from October 29, 1869, and upon $234.93 from April 23, 1870, and upon $162.46 from October 28, 1870, and upon $218.02 from April 27, 1871, and upon $112.92 from April 30, 1871, and upon $96.68 from February 23, 1872, and costs of suit.

And considering that the said S. A. Stockdale was in his life-time collector of internal revenue for the first collection district for the State of Louisiana, and that this action was brought against him in his official and representative capacity for money unlawfully exacted and collected from plaintiff, and by him paid into the Treasury of the United States, in the performance of his official duty as such collector of internal revenue, it was ordered that no execution or other writ for the enforcement of the decree issue against the said defendant, Laura Ellen Jones, widow of Sidney Stockdale, but that the sum be paid out of the proper appropriation from the Treasury of the United States, as provided by law in such cases.

ASSIGNMENT OF ERRORS.

First. The court below erred in overruling motion of defendant to exclude from the jury all evidence tending to show that plaintiff did not, as agent of his consignors, purchase and affix stamps to tobacco by him sold during the period mentioned in his petition, on the ground that it was against good morals and public policy to permit plaintiff to show that the accounts rendered by him to his consignors were false, the defendant having filed in evidence an admission of the plaintiff to the effect that in the account of sales rendered by him to his consignors he had credited to them the gross amount of sales of tobacco by him made for them, and had charged against them the amount expended by him for the purchase of stamps affixed by him to the tobacco sold, and also with commissions on gross amount of sales, including thereon costs of stamps.

Second. The court below erred in overruling the objection made by defendant's counsel to the reception of any evidence tending to show that during the period mentioned in plaintiff's petition, he, the plaintiff, sold for consumption any tobacco on which tax had not been paid, and to which stamps had not been affixed, on the ground that such sales were prohibited by law, and the plaintiff could not be permitted to prove a violation of law on his part for the purpose of attempting to establish his demands.

Third. The court below erred in overruling the objection of plaintiff's counsel to the reception of any evidence tending to contradict the sworn returns made by the plain-

tiff of gross sales of tobacco made by him, on the ground that the plaintiff could not be permitted to contradict his sworn returns in the absence of any allegation of error or fraud.

Fourth. The court below erred in refusing to grant the instructions numbered 2, 3, 4, 5, 6, 8, and 9, which were asked for by defendant's counsel, and in giving in lieu thereof the instruction which was granted by the court.

ARGUMENT.

When this case was heard before, the court decided (103 U. S. Reports, 87) that "a dealer in tobacco, who is assessed upon his sales thereof when it is in a bonded warehouse, is not liable to be taxed for the revenue stamps required to be affixed thereto before the removal thereof, unless they were at the time of such sale so affixed, whereby they entered into the value of the tobacco and formed a part of the price thereof."

According to my understanding of this decision, it was in substance held that under the law in force at the time of the transaction a party owning tobacco in a bonded warehouse could sell it in bond—that is, he could sell all his right, title, and interest in it, which was the right to withdraw it for sale or consumption on payment of the tax; that by a transfer of the warehouse receipt he could invest the purchaser with that same right, and that in such case the liability of the vendor to the tax would depend upon the amount for which he sold that right, the amount for which he sold the tobacco subject to the tax.

Under this view of the law the vital question in the case would seem to be, When did the transfer from Van Benthuysen become a sale? If the payment of the tax and the affixing of the stamps by him were conditions precedent of the sale, then it is clear that until that was done there was nothing but an agreement to sell; that the title to the tobacco did not pass until the stamps had been

affixed, and that at the time it did pass the value of the stamps necessarily constituted a part of the price for which the tobacco sold, and for this price the dealer should be taxed.

If, upon a sale of chattels, anything remains to be done as between the vendor and the vendee before the goods are delivered, a present right of property does not attach in the vendee. This principle of law is elementary, and so well settled as not to call for any citation of authorities. And if the right of property in the tobacco in question did not pass to Van Benthuysen's vendee until the stamps were affixed, the sale was a sale of stamped tobacco, and falls clearly within the language of the court. If the tobacco was only bargained away, with an agreement that it was to be delivered duly stamped, this bargain did not ripen into a sale until the tobacco was stamped, and therefore at the time of sale the tobacco was tax-paid tobacco.

In view of the foregoing considerations the admission of the plaintiff on the trial in the court below becomes important. It appears from the record (page 9) that he admitted that during the period from March 1, 1869, to January 31, 1872, he, the plaintiff, in his account of sales of tobacco rendered to his consignors, credited them with the gross sales of tobacco, and charged them with the amount by him expended for the purchase of stamps affixed to such tobacco, and with his commissions on the gross amount of sales. This, we submit, amounts to an admission that he charged his consignors with the cost of tax-paid stamps, and that he could not have done so unless the stamps had been affixed before the sale of the tobacco.

Such an admission as this amounts to an estoppel, be-

cause the plaintiff had by his own voluntary act placed himself in such a situation in regard to the fact in dispute that he was precluded from denying it. When an admission is made by one party in such a way that the other party relies on the admission as the consideration for something done or forborne by him, then the admission may conclude by way of estoppel the party making it (2d vol. Wharton on Evidence, sec. 1085).

A man is said to be estopped when he has done some act which the policy of the law will not permit him to gainsay or deny. The foundation of this rule is laid in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law to prevent the great mischiefs resulting from uncertainty, confusion, and want of confidence in the intercourse of men if they were permitted to deny that which they had deliberately and solemnly asserted as true (1st vol. Greenleaf on Evidence, sec. 22).

If a representation be made of any fact with a view of influencing the conduct of another, or to derive an advantage to the party, and which cannot afterwards be denied without a breach of good faith, such an admission will not only be evidence of the fact but will usually preclude the party who has made it from insisting on the contrary. In such cases the admission does not operate merely as presumptive evidence of the actual truth of the fact, which must give way to positive proof of the contrary, but precludes, and, as it were, estops the party on grounds of policy from repudiating his own representation (Starkie on Evidence, vol. 2, part 1, page 19).

In view of these well-settled principles, we submit that

the court committed an error in overruling the motion of the defendant to exclude from the jury all evidence tending to show that the plaintiff did not, as agent of his consignors, purchase and affix stamps to tobacco by him sold during the period mentioned in his petition.

In support of the second and third assignments of error, the attention of the court is called to sections 71 and 78 of the act entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July 20, 1868 (15 Stat. at L., 156–159).

As to the fourth assignment of error, we submit that the entire series of instructions as asked for by defendant was correct, and that it was error in the court below to refuse them. Upon the whole case, we submit it sufficiently appears that the stamps were affixed to the tobacco at the time of sale, and necessarily constituted part of the price for which the tobacco sold; but if the court should be of a different opinion, we claim that the case should be remanded for the purpose of ascertaining clearly whether the stamps had been affixed to the tobacco at the time of the sale or not.

Respectfully submitted,

JOHN GOODE,
Solicitor General.

In the Supreme Court of the United States.

OZARK LAND COMPANY,
vs. No.
J. W. LEONARD, *et al.*

In Circuit Court, United States, Eastern District of Arkansas.

To the Judge of the Circuit Court of the United States for the Eastern District of Arkansas.

The Ozark Land Company, a corporation duly created and organized, and doing business under the laws of the State of Missouri, brings this, its bill against J. W. Leonard, a citizen of the state of Tennessee.

And thereupon your orator complains, and says, that it is the owner in fee simple of the following described real estate, situated in the counties of Green and Clay, in the State of Arkansas, to wit:

The N. W. one-fourth of the S. E. one-fourth of section 23.

The N. W. one-fourth of section 26, both in T. 18, N. R. 7 E.

The west one-half Section 11.

The N. W. one-fourth of Section 14.

The S. one-half N. E. Section 15.

The E. one-half N. W. one-fourth, Section 15.

The E. one-half Section 9.

The E. one-half Section 14.

All in T. 19, N. R. 8, E.

And N. W. one-fourth Section 6.

S. E. S. W. one-fourth Section 6.

N. E. one-fourth of S. W. one-fourth Section 6.

W. one-half S. E. one-fourth Section 6.

N. E. one-fourth Section 7.

N. W. one-fourth Section 7.

S. E. one-fourth Section 7.

S. W. one-fourth Section 7.

S. one-half section 3.

S. E. one-fourth section 4, all in T. 19, N. R. 9, E., of the value of four thousand dollars.

The said lands were swamp and overflowed lands, and as such were granted to the State of Arkansas by an act of Congress of the United States, entitled an Act to enable the State of Arkansas and other States to reclaim the swamp and overflowed lands within their limit, approved Sept. 28th, 1850.

That said lands were duly sold by the State of Arkansas, and certificates of purchase issued in pursuance of such sales calling for deeds or patents to said lands from the State of Arkansas to the legal owner of such certificates; that said lands were by the State of Arkansas duly conveyed, patented to W. W. Dancy, Caroline M. Wesson, and Charles M. Wesson as the sole heirs-at-law of one Wyatt

Maye, deceased, who departed this life the owner of said lands, and in fee simple by virtue of being the legal owner of said certificates of purchase, which patents or deeds are dated August 15th, 1876.

That said W. W. Dancey, Caroline M. Wesson, and Charles M. Wesson, by proper deed of conveyance, dated April 27, 1882, conveyed said lands to complainant, a copy of which conveyance is hereto attached, marked Exhibit A.

Complainant further represents that defendant procured from one J. J. Allen and Nancy A. Allen, his wife, a proper deed of conveyance, dated February 2d, A. D. 1883, ostensibly conveying said lands to him, except the N. W. one-fourth N. E. one-fourth section 23, and said N. W. one-fourth section 26, T. 18, N. R. 7 E. Also that defendant procured another similar conveyance from said Allen, dated April 26, 1883. Copies of which deeds are hereto attached, marked Exhibit B and C respectively.

Your orator further represents, that said E. one-half of said section 9, in T. 19 N., R. 8, E., was purchased from the State of Arkansas by one W. R. Cunningham, and a certificate of purchase duly issued to him as such purchaser, on the 19th of September, A. D. 1857; that said Wyatt Maye was at the time of his death the last assignee of such certificate of purchase, assigned by said Cunningham, and as such last assignee entitled to a conveyance of said land from the State of Arkansas. Your orator further represents that one R. V. Richardson purchased from the State of Arkansas the said E. one-half, E. one-half of said section 14, T. 19 N., R. 8 E., and received a certificate of purchase therefor, dated May 18th, A. D. 1858; that said Richardson assigned said certificate of purchase, and that said Wyatt Maye was at the time of his death the last assignee of said certificate, and as such entitled to a conveyance from the State of Ar-

kansas; that said Wyatt Maye departed this life intestate, leaving surviving as his sole and only heirs at law his nephew, the said W. W. Dancey, and his niece, the said Caroline M. Wesson; that said Charles M. Wesson is the husband of said Caroline.

Your orator further represents that it is informed and believes that defendant claims, that said Allen acquired title to said E. one-half of section 9 and E. one-half of said section 14 from one C. D. Lawson, by deed of conveyance dated April 21, A. D. 1883, and claims that said Lawson obtained title thereto by conveyance from one H. W. Peters, dated October 1877, and that said Peters obtained a conveyance or patent from the State of Arkansas, dated July 3d, 1874, upon a certificate of purchase issued for said land, dated August 21st, 1860.

Your orator further represents that said lands had been duly sold by the State of Arkansas to said W. R. Cunningham and R. V. Richardson, as above set forth, and that they and their assignees were the equitable owners of said lands, and that any sale of said lands or pretended sale thereof made by the State of Arkansas thereafter was illegal and void, and that any patent issuing thereon, or any deed of conveyance from the State of Arkansas to any holder of a certificate of such purchase, would inure to the benefit of the assignee of said Cunningham and said Richardson, and that said assignee would in equity be entitled to a conveyance of said lands from the said Peters, or his grantee or grantors, and your orator represents that it is now entitled to a conveyance to said lands from defendant, the said Leonard.

Your orator further represents that it is informed and believes, and so charges the fact to be, that defendant, said Leonard, claims that said Allen derived title to the said N. W. one-fourth of section 26 from one W F. Parkins,

by deed of conveyance, dated January 17th, 1883, and that said Parkins obtained his title thereto by deed of conveyance commonly called a donation deed, from the Commissioner of State Lands, of the State of Arkansas, as lands that had been forfeited to the State for non-payment of taxes, dated September 5, 1882; that the State of Arkansas had no title whatever to said land; that there was a pretended sale of said land by the collector of said county on the 16th of July, A. D. 1877, for the taxes of 1876; that said day was not the day fixed for sale of said lands for non-payment of such taxes, but was attempted to be fixed by the Governor of said State by proclamation in accordance with "An act to provide for the filling the office of collector of revenue in certain cases," approved February 25, 1875.

That the said praclamation was not made in accordance with the terms of said act authorizing it; that by its terms said land could not be legally advertised for sale for two weeks in a newspaper prior to such sale; that the sale of said land was not so advertised prior to said sale, either between the first Monday of May and first Monday of June, as the law required, or after the 9th day of July, 1877, and prior to the 16th of said month, the day of said sale as fixed by said proclamation.

That there was no time fixed by said proclamation, for the return of the delinquent list for said year, but fixed that the taxes should be paid by the 26th day of May, 1877. That said proclamation did not give the taxpayer the same time to pay, and the collector the same time to perform his duties, as allowed by law, in case no vacancy in the office of collector had occurred, as provided by said act. That said land was not returned delinquent by the collector of said county at the time provided by law.

That there were charged against said land, State and

county, taxes amounting to two dollars, and a penalty for non-payment of fifty cents; that said land was struck off to the State of Arkansas for the sum of $3.25; that the only costs chargeable against the same was twenty-five cents printer's fee, if said lands had been legally advertised. That there was not three dollars and twenty-five cents due upon said lands, taxes penalty and costs.

That the pretended sale of said land to the State for non-payment of said taxes was totally void, and passed no title whatever to the State of Arkansas.

Your orator further represents that it is not advised from whom defendant claims said Allen obtained title to the said N. W. one-fourth of the S. E. one-fourth of said section 23, but your charges, that from whatever source your defendant may claim, he has no actual title thereto; that if based upon any tax sale that such sale was totally void.

Your orator further represents that it is informed and believes, and so charges the fact to be, that defendant claims that said Allen derived title to the said W. one-half of section 14, the said N. W. one-fourth of section 14, said S. one-half N. E. one-fourth of said section 15, said E. one-half, N. W. one-fourth section 15, said N. E. one-fourth N. W. one-fourth, S. E. one-fourth, and S. W. one-fourth of said section 7, and said S. one-half section 3, and S. E. one-fourth of section 4, all in T. 19 N., R. S. E., from the Commissioner of State lands of this State by deeds dated respectively January 6th, 1883, January 22d, 1883, and January 30th, 1883, and further, that he claims that said Allen derived title to said N. W. one-fourth of said section 6 by a conveyance executed by J. S. Baker and S. E. Baker, his wife, dated January 13, 1883, and that said Baker derived title thereto by a deed known as a donation deed, executed by the Commissioner of State lands, dated January 6, 1883, and that said Allen derived title to said

S. E. one-fourth and N. E. one-fourth, S. W. one-fourth and W. one-half S. E. one-fourth of said section 6, from S. E. Baker by deed of conveyance dated January 13, 1883, and that said S. E. Baker obtained title thereto by deed of conveyance known as a donation deed, from the Commissioner of State lands of this State. That all of said deeds of conveyance from said Commissioner of State lands purported to convey the lands therein described as lands that had been forfeited to the State of Arkansas for the non-payment of taxes for the years mentioned therein; that said lands with the exception of said S. one-half N. E. one-fourth said section 15 and said E. one-half N. W. one-fourth said section 15, were all attempted to be sold in 1876 for the taxes of the years 1873, 1874 and 1875; that a notice of the sale of said lands as delinquent for said taxes was not published in a newspaper published in said county for two weeks between the 4th Monday of April and the 3d Monday of May, prior to said sale, as required by law.

Your orator further represents that there was for the year 1873 levied as a county tax in said county, for general county purposes, 5 mills on the one dollar valuation of property situated therein; for bridge purposes, 1 mill; for road purposes, 1 mill; a poor tax of 3 mills; to pay floating debt, one-fourth of one mill; county school tax, one-fourth of one mill, and for public buildings there was levied a tax of 20 mills on each one dollar valuation of taxable property in said county; that by law two and one-half mills could be levied for public buildings.

Your orator further represents that said one-fourth mill school tax was levied without any rate of the qualified rates of the different school districts in said county; that said levy of said county taxes was wholly void; that said illegal and void taxes were extended against said lands upon the tax books for that year.

That for the year 1875 there was levied upon the taxable property of said county a county tax for general county purposes, of five mills on each one dollar valuation of taxable property in said county, and levied to pay outstanding two and one-half mills on the one dollar valuation, and to pay other debts, not specified, two and one-half mills on the one dollar valuation; that said levy of two and one-half mills on the one dollar to pay outstanding indebtedness, and two and one-half mills to pay other indebtedness was in excess of the amount authorized by law to be levied, and was void. That said pretended county indebtedness, for which said levy was made to pay, was wholly illegal and void, and no legal charge whatever against said county.

That all of said illegal taxes were extended on the tax books for said years, and the collector, by the warrant attached thereto, was required to collect such illegal taxes with penalty thereon. That said collector for said county for the year 1876, charged with the collection of taxes for the years 1873, 1874 and 1875, received from the clerk of said county the tax books, with said illegal county taxes extended thereon against said lands, and said lands were by said collector returned delinquent, for the non-payment of said illegal county taxes, and by him attempted to be sold to the State of Arkansas for the non-payment thereof, on the 15th day of May, 1876.

That said pretended sale or forfeiture of said land was wholly void, and passed no title whatever to the State of Arkansas.

Your orator further represents, that said S. one-half of the N. E. one-fourth and said E. one-half N. W. one-fourth of said section 15 appear from the said deed of conveyance, executed by said Commissioner of State lands, to have been forfeited to the State for the taxes of 1866; that no list of said lands was ever filed for record in the recorder's

office of said county as having been forfeited for the taxes of said year under the hand of the collector, and attested by the clerk of said county, as the law required. That no list was made out and recorded by the clerk of said county, showing the amount of taxes penalty and costs charged against said lands. That said lands were not advertised for sale by a notice in a newspaper and by a copy of a list containing a description of said lands posted at the court house door in said county, four weeks prior to such sale, if any such sale there was; that said pretended sale, for these and many other reasons, was totally void, and said State of Arkansas had no title whatever to be conveyed by said commissioner to said Allen.

Your orator further represents that said J. J. Allen and Nancy O. Allen, his wife, conveyed by proper conveyence dated April 26, 1883, to defendant, ostensibly conveying to him the said N. W. one-fourth of the S. E. one-fourth of section 23, and said N. W. one-fourth of said section 26, in T. 18, N. R. 7 E.

That said Allen had no title to said lands conveyed to him by said Commissionor of State Lands. and no title whatever to said lands conveyed to him by W. F. Parks, by J. S. Baker and S. E. Baker, his wife, nor by S. E. Baker.

That all of said deeds to said Allen, and from said Allen and his wife to said defendant, have been placed upon record, and are clouds upon your orator's title to said land.

Your orator further represents that a large portion of the taxes charged against said lands, for which the same was attempted to be sold to the State of Arkansas, were illegal, that the amount of taxes paid by said defendant, or by his said grantor, the said Allen, is unknown to your orator, that your orator is ready and willing, and hereby offers to pay said Leonard, the defendant, such amount as the Honorable Court shall find to be equitably or legally due upon a hear-

ing of this cause, for any and all tax liens discharged from said lands, by either said Leonard or his grantor, the said Allen.

That said conveyance or patent issued to said H. W. Peters, and said conveyance by said Peters to said Lawson, and by said Lawson to said Allen, and by said Allen to said Leonard, conveying said E. one-half of section 9, and said E. one-half E. one-half of said section 14, in T. 19, N. R. 8 E., are all clouds upon complainants said title; that said conveyances greatly damage the title of complainants said lands and injure the sale thereof.

Your orator further represents that no person whatever is in the actual possession of said lands; that your orator, by virtue of being the legal owner of said lands, is in constructive possession thereof; that said lands are wild and uncultivated lands, and chiefly valuable for the timber standing and growing thereon; that said lands are well timbered and valuable for such timber.

Your orator further represents that said J. W. Leonard is trespassing on said lands and cutting and hauling off the most valuable trees, and is using said clouds and pretending to be the owner of said lands by virtue of said conveyance from said Allen for that purpose.

Your orator further says that unless said J. W. Leonard be enjoined and restrained by this Honorable Court from so cutting and removing the timber from said lands the value of said lands will be greatly lessened in value.

Your orator further states that it is informed and believes, and so states the fact to be, that said Leonard has no permanent property in this State; that his whole property in this State consists in clouds upon titles to lands conveyed to him by said Allen; that said Allen had no actual title to any of the lands conveyed by him to said Leonard.

Complainant further says that unless said J. W. Leonard

be enjoined and restrained by this Honorable Court from so cutting and hauling trees and timber from said lands said lands will be greatly damaged, and that complainant will be without any substantial remedy for such damages.

For as much, therefore, as your orator is without remedy except in a court of equity, and to the end that said J. W. Leonard, who is made a party defendant to this bill, be required to answer the allegations hereof, that said deeds of conveyance from said Commissioner of State lands to said J. J. Allen, W. F. Parks, J. S. Baker and S. E. Baker, and from said W. F. Parks, J. S. Baker and S. E. Baker to said J. J. Allen and that said conveyance from the State of Arkansas to said Peters, and from said Peters to said Lawson, and from said Lawson to said Allen, and that said conveyances from said J. J. Allen to said defendant, J. W. Leonard, be all set aside and declared void as against your orator's title to said lands, as clouds thereon, and that your orator may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this Honorable Court shall seem meet.

And may it please your Honor to grant unto your orator a writ of injunction, issuing out of and under the seal of this Honorable Court or issued by one of your Honors, according to the form of the statute in such cases made and provided, commanding, enjoining and restraining said Leonard from cutting or removing any trees, logs or timber, or any staves manufactured from trees or timber, from any of the following lands, to-wit; being situated in the State of Arkansas:

The N. W. one-fourth of the N. E. one-fourth section 23 and the N. W. one-fourth of section 26, in T. 18 N., R. 7 East.

The W. one-half section 11, the N. W. one-fourth of section 14, the S. one-half N. E. one-fourth, and the E. one-half N. W. one-fourth of section 15, the E. one-half, section

9, the E. one-half E. one-half, section 14, all in T. 19 N., R. 8 E.

And the N. W. one-fourth section 6, and the S. E. one-fourth, S. W. one-fourth, and the N. E. one-fourth, S. W. one-fourth, and the W. one-half, S. E. one-fourth, of section 6. The N. E. one-fourth, the N. W. one-fourth, the S. E. one-fourth and the S. W. one-fourth of section 7. The S. one-half of section 3, and the S. E. one-fourth, section 4, all in T. 19. N. R. east until the further order of this Honorable Court and, may it please Your Honors, to grant unto your orator a writ of subpoena issuing out of and under the seal of thts Honorable Court, directed to said J. W. Leonard, defendant, commanding him on a certain day therein named and under certain penalty to be and appear in this Honorable Court, then and there to answer all and singular the premises, and to stand and perform and abide such further order, direction and decree as may be made against them.

And your orator, as in duty bound, will ever pray, &c.

JOHN B. JONES,
Solicitor for Complainant.

IN THE CIRCUIT COURT OF THE UNITED STATES.

EASTERN DISTRICT OF ARKANSAS.

OZARK LAND COMPANY, a Corporation Organized and Doing Business Under the Laws of the State of Missouri, *vs.* J. W. LEONARD.	Bill in Equity.

On this day comes the complainant, by John B. Jones, its attorney, and by leave of Court, amends its bill as follows:

1st. On page one (1) after line 11, insert the following: And J. J. Allen and John McRea, citizens of the State of Arkansas.

2d. On page 1 of the bill, after the last line, insert the following:

Also the S. W. one-fourth of S. E. one-fourth of section 3, and S. E. one-fourth, S. W. one-fourth, and N. E. one-fourth, N. W. one-fourth section 3, S. W. one-fourth, section 3.

The W. one-half N. W. one-fourth, section 15.

The S. W. one-fourth S. E. one-fourth, section 4.

And the N. W. one-fourth, section 14, all in T. 19, N. R. 8 E.

3d. On page 3 of the bill, in line 17, after the word "defendant" insert J. W. Leonard, and insert in line 18 on said page, after J. J. Allen, the words, "who is made defendant to this bill."

4th. On page 18 of the bill, in line 18, after the word "purpose" insert the following:

That said Allen and said Leonard combined together to make and procure said illegal titles, for the purpose of cutting the timbers from said lands.

That John McRea, one of the defendants named in this bill, is either interested with said Leonard and said Allen, or is acting as agent in cutting said timber and marketing staves manufactured therefrom. That the amount of staves cut and sold, and the damage to said lands caused by said cutting, greatly exceeds the amount of money required to discharge all tax liens upon said lands, that have been paid by said Allen and said Leonard.

5th. On page 18 of the bill, in line 20, after "J. W. Leonard," insert the following: J. J. Allen and John McRea.

6th. On page 19 of the bill, in line 13, after "J. W.

Leonard," insert the following: And J. J. Allen and John McRea.

7th. On page 19, between lines 24 and 25, insert: And J. J. Allen and John McRea.

8th. On page 20 of the bill, after the word "thereon," insert the following: And that your Honors will take an account of the amount of timber and staves cut from said lands by said defendants, and after deducting therefrom the amount of legal taxes paid upon said lands by said parties, that your Honors will order and decree that the balance be paid to your orator, and that execution issue therefor.

9th. On page 21 of said bill, between lines 14 and 15, insert the following:

Also the S. W. one-fourth S. E one-fourth, section 3.

The S. E. one-fourth S. W. one-fourth and N. E. one-fourth N. W. one-fourth, section 3.

The S. W. one-fourth S. W. one-fourth, section 3.

The W. one-half N. W. one-fourth, section 15.

The S. W. one-fourth S. E. one-fourth, section 4.

The N. W. one-fourth, section 14.

All in T. 19 N., R. 8 East.

10th. On page 22, in line 1, after the word "J. W. Leonard," insert the following: And J. J. Allen and John McRae.

JOHN B. JONES,
Solicitor for Complainant.

THE OZARK LAND COMPANY,
vs.
J. W. LEONARD, *et al.*

The defendant, J. W. Leonard, not admitting, etc., demurs to the bill of complaint herein, original and amended, and for causes of demurrer assigns as follows, to-wit:

First. The complainants failed to allege that they are or were at the date of the filing of the said bill of complaint in possession of the lands mentioned in the said bill of complaint, original and amended, or to show any state of fact from which possession can be legally inferred.

Second. The complainants allege and show that the said defendant J. W. Leonard was entirely in possession of the lands mentioned in the said original and amended bills and using the same, under titles which they do not charge to be void but only inferior to their own.

Third. The complainants, though alleging in their bill, original and amended, that the said lands are wild, unimproved and unoccupied, yet show and allege the very reverse of this in the said bill, original and amended, by showing and charging that the defendant is in possession and occupation under certain titles, claiming the same as his lands and cutting the timber therefrom and converting the same into staves.

Fourth. The complainants do not show in their said bill, original and amended, that there is any obstacle in their way to the assertion of their titles by action at law and do not in the remotest way indicate any reason why a court of equity should intervene between them and the said J. W. Leonard as to the matter of titles to determine who have the better title.

Fifth. The complainants do not show any reason why a

court of equity should interfere to prevent waste or restrain defendant from the use of the said lands.

Sixth. If the complainants could invoke a court of equity to interpose in matters of waste or the use of the defendant of the lands aforesaid, this would not draw to the court of equity for determination the respective titles of the complainants and defendant.

Seventh. If the complainants are to be considered as assuming in their bill, original and amended, that the titles of this defendant are void, then the said complainants can not maintain their said bill, original and amended, nor implead this defendant in a court of equity on the matter of titles.

Eighth. The complainants have failed on the face of their bill, original and amended, to show that the titles of the defendant J. W. Leonard are void or that their titles are superior to his.

Ninth. There is no equity in the bill, original and amended, of the complainants. Wherefore the defendant J. W. Leonard prays whether he shall be compelled to answer herein.

T. W. BROWN,
O. P. LYLES,
Solicitors for Leonard.

The other defendants named in the bill, J. J. Allen and John McCrae, come and demur, and adopt the above demurrer as their own.

T. W. BROWN,
O. P. LYLES,
Solicitors for Allen and McCrae.

OZARK LAND COMPANY
vs.
J. W. LEONARD *et al.*

Comes the complainant, by John B. Jones, Esq., its solicitor, and comes the defendant, by T. W. Brown and O. P. Lyles, Esqs., his solicitors, and by agreement of parties the demurrer to the bill is set down for argument the 15th day of May, 1884.

OZARK LAND COMPANY
vs.
J. W. LEONARD, J. J. ALLEN AND JOHN MCRAE.
} In Equity.

Comes John B. Jones, solicitor for complainant, and by leave of Court amended its amended bill as follows:

Tenth. Between lines 8 and 9, on page 3 of said bill, after the figures "1876," insert the following:

That the said W. W. Dancey, Caroline M. Wesson and Charles M. Wesson executed a deed of conveyance dated July 9, 1873, ostensibly conveying said lands to the Memphis and St. Louis Railroad Company, a corporation organized under the laws of Arkansas, and that said Memphis and St. Louis Railroad Company, by Luke E. Wright, its duly and legally appointed attorney in fact, by deed of conveyance duly executed, dated February 1, 1883, duly conveyed all the right, title and interest of said Memphis and St. Louis Railroad Company to complainant, a copy of which deed, with a copy of the power of attorney thereto attached, is herewith filed, marked exhibit, and made a part of this amendment to said bill; that said Wright had

full power and authority to execute said deed, and his acts in so doing were afterwards duly ratified and confirmed by the board of directors of said Memphis and St. Louis Railroad Company.

Eleventh. In line 1 on page 20 of said bill, after the word "hereof," insert the following:

But not under oath, the oath to such answer being hereby expressly waived.

JOHN B. JONES,
Solicitor for Complainant.

WM. H. CHATFIELD, TRUSTEE,
vs.
J. W. LEONARD, *et al.*,
and
OZARL LAND COMPANY.
vs.
J. W. LEONARD, *et al.*

In these causes it is agreed by the complainants that the defendants may, in answer, avail themselves of all matters of defense, whether to the jurisdiction in abatement or on the merits in fact, that all questions may be made by defendants, and considered, except such matters as are presented in the demurrer already disposed of, and except any questions that may have been waived by demurrer.

JOHN B. JONES.
COLLINS & BALCH,
For Chatfield.

OZARK LAND COMPANY,
vs.
J. W. LEONARD, *et al.*

Comes the complainanant, by John B. Jones, Esq., its solicitor, and it appearing that the defendants, J. W. Leonard, J. J. Allen and John McRea, have been duly served with process herein, and have failed to appear, answer, plead or demur to the bill of complainant herein. It is ordered that said bill be taken as true and confessed by said defendants.

THE OZARK LAND COMPANY,
VS.
J. W. LEONARD, JOHN MCREA AND J. J. ALLEN.

Nov. 7, 1884. *Pro Confesso and Final Decree same day.*

This day comes the Ozark Land Company, complainant, by John B. Jones, its solicitor, and it appearing to the Court that the above named defendants were duly and personally served with process and entered their appearance in this cause on the first Monday of March, 1884, and on the first Monday of October, 1884, the said defendants having failed to plead, answer or demur to said bill, the same was taken pro confesso as against them. And now the cause coming on to be heard upon the said bill so taken as confessed, and the Court having heard the argument of counsel, and being fully advised in the premises, orders, adjudges and decrees that the complainant is the owner in fee of the following described lands, situated in the county of Clay and the county of Greene, in the State of Arkansas, to-wit:

The east half of the northwest quarter (one-fourth) of section three (3). The west half of the southeast quarter (one-fourth) of section (3) three. The east half of the southwest quarter (one-fourth) of section three. The southwest quarter (one-fourth) of the southwest quarter (one-fourth) of section (3) three. The southwest quarter (one-fourth) of section four (4). The southeast quarter (one-fourth) of the southeast quarter (one-fourth) of section (10) ten. The west half of section (11) eleven. The north half of section (15) fifteen. All in Township nineteen (19) north, Range eight (8) east. And the south half of section three (3). The southeast quarter (one-fourth) of section four (4). The west half of the southeast quarter (one-fourth) of section six (6). The east half of the southwest quarter (one-fourth) of section six (6). The northwest quarter of section six (6).

And all of section seven (7), all in township nineteen (19) north, range nine (9) east, and the northwest quarter of section twenty-six (26), in township eighteen (18) north, range seven (7) east, and that complainant is the equitable owner of the east half of section nine (9) and the east half of the east half of section fourteen (14), in township nineteen (19) north, range eight (8) east, in said county of Clay, in said State of Arkansas, as alleged in the bill filed in this cause.

That the tax deed described in said bill executed by the Commissioner of State Lands, for the State of Arkansas, dated January 6, 1882, purporting to convey to John J. Allen the southwest quarter (one-fourth) of the southeast quarter (one-fourth), the southeast quarter of the northwest quarter (one-fourth), the northeast quarter (one-fourth) of the southwest quarter (one fourth), of section three (3;) the southwest quarter (one-fourth) of the southeast quarter (one-fourth), of section four (4), and the west half of the northwest quarter (one-fourth), of section fifteen (15), in

township nineteen (19) north, range eight (8) east, is void, and conveyed no title to said Allen, for the reasons alleged in the said bill.

That the tax deed described in said bill executed by said commissioner purporting to convey the said west half of section eleven (11), the northwest quarter (one-fourth) of section fourteen (14), and the south half of the northeast quarter (one-fourth) and the east half of the northeast quarter (one fourth) of section fifteen (15), in township nineteen (19) north, range eight (8) east, is void, and conveyed no title to said Allen, for the reasons stated in said bill.

That the tax deed described in said bill executed by said Commissioner of State Lands purporting to convey to said John J. Allen with other lands, the south half of section three (3), the southeast quarter (one-fourth) of section four (4), and the northwest quarter (one-fourth) of section seven (7) in township nineteen (19) north range nine (9) east, is void, and conveyed no title to said Allen, for the reasons alleged in said bill.

That the tax deed described in said bill executed by said commissioner, purporting to convey said southwest quarter (one-fourth) of section seven (7) in township nineteen (19) north range nine (9) east, is void, and conveyed no title to said Allen for the reasons alleged in the said bill.

That the donation deed described in said bill purporting to convey to one J. S. Baker the northwest quarter (one-fourth) of section six (6) in township nineteen (19), north range (9) east, executed by said commissioner, is void, for the reason alleged in said bill.

That the donation deed described in said bill executed by said commissioner, purporting to convey to Mrs. S. E. Baker the northeast quarter (one-fourth) of the southwest quarter (one-fourth). The southeast quarter (one-fourth) of the southwest quarter (one-fourth) and the west

half of the southeast quarter, one-fourth of section six (6) in township nineteen (19), north range nine (9) east, in said county of Clay, is void, for the reasons alleged in the said bill, and that the deeds described in said bill executed by said J. S. Baker and S. E. Baker conveyed no title to said Allen.

That the deed executed by said Commissioner of State lands, described in said bill, purporting to convey to said Allen the said east half of section seven (7), in township nineteen (19) north, range nine (9) east, is void for the reasons set forth in said bill.

That the donation deed executed by said Commissioner, described in said bill, purporting to convey to one W. F. Parks the said northwest quarter (one-fourth) of section twenty-six (26), in township eighteen (18) north, range seven (7) east, is void for the reasons stated in said bill, and that the deed described in said bill, executed by said Parks to said Leonard, conveyed no title to said land.

That W. R. Cunningham purchased from the State of Arkansas the east half of the east half of section fourteen (14) in said township 19 north, range eight (8) east, on the 19th of September, 1857, and paid for the same according to law, and received a certificate for patent for the same. That said certificate for patent was by said Cunningham duly assigned to one Wyatt Maye for a valuable consideration. That said Maye departed this life intestate, leaving as his sole heirs at law W. W. Dancey and Caroline Wesson; that said Caroline Wesson and W. W. Dancey procured a patent to said land from the State of Arkansas, as the heirs at law of said Wyatt Maye, dated August 15, 1876, that said W. W. Dancey and Caroline Wesson duly conveyed said lands to the complainant by deed dated April 27, 1882. That the purchase of said lands by H. W. Peters, August 21, 1860, was illegal, and the patent issued by said

State of Arkansas to said Peters, dated July 3, 1874, was without authority of law. That the conveyance of said lands, described in said bill, from Peters to C. D. Lawson, from said Lawson to said Allen, and from said Allen to said Leonard are all in fraud of complainants' right and title to said lands, and such title as said Leonard acquired by such conveyance is held by him in trust for complainant, and that said Leonard convey such title as he so acquired to complainant within sixty days from this date and in default of such conveyance being executed by said Leonard, that then and in that case Charles P. Redmond, the master in chancery of this court, be and he is hereby appointed a commissioner to execute such conveyance, and a deed of conveyance so executed by said master in chancery, shall have the same force and effect as if executed by said Leonard.

That the deeds of conveyance described in said bill are dated February 2d, 1883; the other, April 26, 1883, both executed by John J. Allen and Nancy O. Allen to said J. W. Leonard, purporting to convey all the above described lands situated in Clay county, Arkansas, and all the above deeds executed by the said Commissioner of State Lands and all other of said deeds conveying any of said lands to said Allen or said Leonard are clouds upon complainants title to said lands and greatly deterioate and damage complainants' said title to said lands.

The said Allen and said McRea were acting as agents of said Leonard in cutting timber from said lands; that said Leonard has caused to be cut and removed from said lands a large amount of valuable timber; that the amount of such timber sold and marketed by him exceeds the amonnt of all claims or levies for taxes due the State of Arkansas and taxes paid by him or his grantor or grantors

upon said lands; and that said Leonard now has no claim or lien whatever upon any of said lands.

That said defendants, J. W. Leonard, John McRea and J. J. Allen are hereby perpetually restrained, asserting title to any of said lands by virtue of any of said deeds of conveyance, or using the same to the damage of complainants said title and perpetually enjoined from cutting and removing any timber from said lands, and that said Leonard deliver up said deeds to be cancelled by this Court.

It is further ordered, adjudged and decreed that defendants pay the costs of this suit, to be taxed by the clerk of this Court, and that execution issue therefrom.

OZARK LAND COMPANY
vs.
J. W. LEONARD *et al.*

On this day appeared the defendants in open court and prayed an appeal to the Supreme Court of the United States from the decree entered herein on the 6th day of October, 1884, and also an appeal from the decree entered herein on the 7th day of November, 1884, which is granted.

The amount of the supersedeas bond in this case is fixed at eight thousand dollars.

OZARK LAND COMPANY
vs.
J. W. LEONARD *et al.*

On this day come the said defendants, by O. P. Lyles, Esq., their solicitor, and file their appeal bond in this case, which is approved; but the appeal and appeal bond in this

cause shall not operate to suspend or effect so much of the decree in this cause as enjoin the defendants from cutting or otherwise trespassing on the lands in controversy in suit, or removing staves or other timber cut thereon.

Know all men by these presents, that we, J. W. Leonard and John McRae and J. J. Allen, as principals, and O. P. Lyles, T. C. Hicks and A. H. Johnson, as sureties, are held and firmly bound unto the Ozark Land Company in the sum of eight thousand dollars, good and lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents, signed, sealed and delivered, this 5th day of May, 1885.

The condition of the above obligation is such that whereas the above bounden, J. W. Leonard and John J. Allen and John McRae, have taken an appeal to the Supreme Court of the United States from certain decrees of the Circuit Court of the United States at Little Rock, Arkansas, rendered by the Hon. Henry C. Caldwell, Judge of the District and Circuit Court for the Eastern District of Arkansas, in equity, on the 7th day of November, 1884, and on the 20th day of April, 1885, in the certain cause in said Court pending in which the said Ozark Land Company were complainant, and the above bounden, J. W. Leonard, John J. Allen and John McRae, were defendants.

Now, if the said appellants shall duly prosecute their appeal with effect, and shall moreover pay the full amount of all costs and damages rendered and to be rendered, accrued and to accrue, in said cause in case the said decrees or either of them shall be affirmed, and shall well and truly pay all costs, damages and charges, for which they or either of

them may be liable, connected with or growing out of said cause, and shall in all respects abide and perform the order, judgment, decree or mandate of the Court made in said cause, then the above obligation shall be void, else to be and remain in full force and virtue.

JAMES W. LEONARD, [SEAL,]
J. J. ALLEN, [SEAL,]
By O. P. Lyles, attorney,
JOHN McRAE, [SEAL,]
By O. P. Lyles, attorney,
O. P. LYLES,
T. C. HICKS,
A. H. JOHNSON.

OZARK LAND COMPANY
vs.
J. W. LEONARD ESTATE.

The affiant, J. W. Leonard, states that he is the real defendant to this suit, the others being merely nominal. It will be observed that he has given a large and well secured bond for supersedeas with his appeal. His object in doing this was to supersede the entire decree below, feeling great confidence that the decree of the court below would be reversed by the Supreme Court. But the district judge of the court below, the Hon. H. C. Caldwell, positively refused to allow the supersedeas to have this effect, and has notified the solicitors of the affiant that if he shall act on the construction that the decree below is superseded, and deal with the lands in controversy on that hypothesis, he will regard and treat affiant as in contempt of court, and especially is this notification and menace extended to cer-

tain lots of staves made by the said affiant on the lands in controversy in this cause. These staves were mainly, if not entirely, made on the said lands before the service of decree in this suit. None have been made since the decree in the court below. They are now on the said lands, there piled or ranked as is usual in the business of stave making preparatory to shipment. The lands and localities whereon the staves are so ranked and piled are low, and inclined to be damp, but especially are these lands and localities considered dense undergrowth with overreaching shade that almost entirely obstructs the sunlight from the said lands and the staves piled thereon. The affiant, who has been many years in the stave making business, says that remaining on the lands where they now are the staves are subject at any time to rot, and they are still more eminently exposed to worms and grub, which may attack them at any time. When the fall shall have advanced so far as to have dried the grasses and the leaves, the woods are exposed to fires, which almost scourge the forests on these lands every fall. Then these staves are exposed to the danger of being consumed by fire, so that the staves aforesaid, being perishable property, are exposed to loss and injury every hour they remain on these lands where they are now. Besides all this the affiant has a contract by which the said staves are to be shipped from the place of shipment to New York from May 1 to November 1, 1885, at thirty-six cents per hundred pounds. After the 1st of November, 1885, affiant can not get the said staves shipped for less than tariff rates on cotton, which are so much greater than the said contract rate as absolutely to be an embargo on all timber shipments. The number of staves on the lands involved in this suit is about twenty thousand, which at the place of shipment are worth about seventy-five dollars per thousand for sixty inch pipe staves, with twelve hundred pieces to the

thousand, and for staves of less grade in proportion. The affiant has got out these staves at great cost and will have to incur still greater expenditure to put them in market. Even if the complainant in this cause should succeed against the affiant in the final recovery of these lands, they could have no interest in the said staves greater than the value of the timber taken from the lands and converted into said staves. This would be only one dollar per tree and only about two hundred trees were used in making the said staves, so that even at the place of shipment the interest of the complainant in the said staves is utterly insignificant compared with that of the affiant, to say nothing about the profit on contracts which the affiant may engage to fill. Thus the course of the court below as aforesaid, in regard to the said staves, cannot be of any benefit to the complainants, but must be of immense damage to the affiant. The action of the court below must in any aspect of it be more in hostility to affiant than for the advantage or protection of the complainants. The affiant has through counsel offered any kind of bond and in any amount to the court below to indemnity or otherwise protect any one injured or to be injured by the removal of the said staves, and is still willing to give and provide any bond in any amount and with the best surety to this end.

If the affiant is not permitted to move the said staves, or is obstructed by the said Judge of the said court in handling the same the loss to him will be exceedingly heavy, indeed it will be irreparable, especially as the complainants have given bond in anywise to indemnify the affiant.

JAMES W. LEONARD.

Subscribed and sworn to before me this August 12, 1885.

W. B. WEISINGER, D. C.,

U. S. Circuit Court.

IN THE SUPREME COURT OF THE UNITED STATES

OF AMERICA, AT WASHINGTON, D. C.

OZARK LAND COMPANY, Complainant,
vs.
J. W. LEONARD ESTATE, Defendants.

Appeal from the decree of the Circuit Court in Chancery in the eastern district of the State of Arkansas.

Decree rendered by Hon. Henry C. Caldwell, and appealed and superseded.

J. B. Jones, Solicitor of Record for said Ozark Land Company, in said cause.

DEAR SIR: You will please take notice that on the 12th day of October, 1885, at the Supreme Court room of the Supreme Court of the United States, at the city of Washington, in the District of Columbia, and before said Supreme Court the defendant in the above-entitled cause will move the said Court for such order in said cause as will allow the said defendant to remove from the land in controversy in this cause the staves that have been made upon the said land, and also for such other appropriate order or orders by said Supreme Court as will supersede the entire decree of the said Circuit Court.

J. W. LEONARD, *Appellant.*

By T. W. BROWN & O. P. LYLES,
Solicitors.

I have served the within by delivery of a copy thereof to W. S. Curran, of the firm of Jones & Curran, the senior partner, John B. Jones, being absent from the city, on this

29th day of September, 1885, in Little Rock, in the eastern district of Arkansas.

DAVID B. RUSSELL,
U. S. Marshal.
By C. E. KIDDER,
D. U. S. Marshal.

Marshal's fees, $2.00.

Original. Ozark Land Company *vs.* J. W. Leonard, estate. Notice.

T. W. BROWN & O. P. LYLES,
Defendants.

IN SUPREME COURT OF UNITED STATES.

THE OZARK LAND COMPANY,
vs. } No.
J. W. LEONARD, *et al.*

It is stipulated in this cause that the record shows:

1st. That original bill was filed December 14, 1883, demurrer thereto filed April 2, 1884, which was overruled July 14, 1884, and decree *pro confesso* and final was rendered October 6, 1884.

2d. That December 27, 1884, application was made to set aside decree and for leave to answer, which motion was pending upon various proceedings had in the cause until as late as the 20th of April, 1885, when the same was overruled, from which decree appeal was prayed and granted.

3d. That on April 29, 1885, appeal was prayed by defendants and the same granted, and that this appeal was from the *pro confesso* and final decree of October 6, 1884, which is recited in supersedeas bond as of 7th day of November, 1884, and also from the decree denying the motion

of defendants to set aside the former decree and for leave to answer, and on June 2, 1885, supersedeas bond for $8,000, with securities, was executed and accepted by the Court below as satisfactory.

4th. That no injunction was granted *pendente lite*, and the same was first ordered in the final decree and as part thereof, though prayed for in originial bill restraining "the defendant, Leonard, from cutting or removing any trees, logs or timber, or any staves manufactured from trees or timber from any of the lands" in controversy.

5th. That the matter in controversy in this cause is over $5,000.

6th. It is further agreed that the motion in this cause, and the record made up for the motion herein, shall be considered and treated as though made up in the cause of W. H. Chatfield, trustee, *vs.* J. W. Leonard *et al.*, No. —, and that the motion made herein be considered as also made in the said last named cause, and the action of the Court on the motion in this cause shall apply to the said last named cause as well as to this, both resting on the same facts so far as this motion is concerned.

7th. It is not, however, to be understood by this stipulation that it is to exclude what appears in the printed book made up on this motion.

T. W. BROWN,
For Appellant.
MANNING & WATSON,
For Appellees.

IN SUPREME COURT OF THE UNITED STATES.

OZARK LAND COMPANY
vs.
J. W. LEONARD *et al.*

And now comes the appellants, and moves the court to vacate so much of the decrees of the court below granting an appeal as qualifies the said appeal and prevents the same from superseding the decree rendered for the appellees, and especially so much of the said decree granting said appeal as prevents the appellant, J. W. Leonard, from removing the staves made on the lands in controversy before service or entry of the decree in favor of the appellees.

116-465

Supreme Court of the United States.

OZARK LAND COMPANY *vs.* J. W. LEONARD ET AL. No. 1183.	*On motion to modify the decree below granting appeal.* Accepting appeal bond
AND	
W. H. HATFIELD, Trustee, *vs.* J. W. LEONARD ET AL. No. 1182.	*On motion to modify the decree below granting appeal.* Accepting appeal bond

---

T. W. BROWN,
For Appellant and for motion.

Supreme Court of the United States.

OZARK LAND COMPANY
vs.
J. W. LEONARD ET AL.
No. 1183.

On motion to modify the decree below granting appeal, & accepting appeal bond.

AND

W. H. HATFIELD, Trustee,
vs.
J. W. LEONARD ET AL.
No. 1182.

On motion to modify the decree below granting appeal, & accepting appeal bond.

By stipulation the latter case is submitted as to the motion on the printed excerpts from record in the case of Ozark Land Company *vs.* J. W. Leonard *et al.*

Printed R., p. 31.

The motion made is to vacate so much of the decree in circuit court granting appeal as prevents, or assumes to prevent, the supersedure in *all* parts of the decrees in favor of the appellees, and *especially* that part of the decree which prevents, or assumes to prevent, the appellant, Leonard, from removing the staves made on the lands in controversy *before* service or entry of decree in favor of appellees.

& appeal bond

Printed R., p. 32.

If that part of the decree granting the appeal, which is aimed at by the motion, limits the *legitimate* operation of the appeal in this case, then it is so oppressive that, though void, this court will by some order relieve the appellant of the

embarrassment consequent on the menace of this unauthorized limitation.

Rule 93, Blatch. Rules, &c., only allows the court below the right to suspend or modify the decree during the pendency of the appeal. The court below did not act under this rule, did not *suspend* or *modify* the decrees *from which* appeal was taken. But he undertakes to order that the appeal shall not, as to certain matters, operate a supersedure. The rule gives no such power and contemplates no such power. It clothes the court granting the appeal only with the power to relieve the *appealing* party as to *such parts* of the decree as *the appeal does not supersede*. So the rule is understood and interpreted in Fisher *vs.* Hayes, 7 Federal Reporter, p. 96—Blatchford, then C. J. In that case the now associate justice of this court says of this rule, that "these provisions for the stay or suspension of the operation of a decree, on giving a bond to secure the rights of the opposite party under the decree, are based on the view that where these rights *can be secured* while a review is pending, it is reasonable to give to the party *seeking* the review the stay or suspension till the questions raised on review are decided, provided he gives security."

The court below did not in these cases give the "party seeking the review" a "stay or suspension," only provided for in the rule, but undertook to limit, by certain clauses in the decree granting appeal, its operation. The rule gives no power or authority to limit as to the "party seeking the review" the operation of his appeal. If the appeal does in law supersede, Rule 93 grants no right to the court to limit. It is perfectly obvious that the rule was made for the relief of parties seeking review as to the action of the court not reached, or rather not superseded, by the appeal. It hath no farther extent.

I.

Does the appeal in these causes operate a suspension of the entire decree?

"The *supersedeas* attaches to so much of the *final* sentence as determines the *ultimate* rights of the party."

Bryan *vs.* Bates, 12 Allen 213; Nauer *vs.* Thomas, 13 *Id.* 574; Fleming *vs.* Clark, 12 *Id.*, 191. Cited by the successful counsel in the Slaughter-house cases and recognized by this court.

10 Wall., 283-'4.

The bills in the cases now under consideration on the motion were filed to remove clouds from the alleged titles of the complainants in the bills. This was the only relief sought by *final* decree. The bill prayed for the issuance of "a writ of injunction," (see page 11 of printed record.) But this, by the very terms of the pleading, was a *preliminary* injunction, to stop *pendente lite* the "cutting of trees and the removing" of "trees, logs or timber or staves." It was no part of the *final* relief *specifically* prayed for, and if proper to be incorporated in the final decree, it could only have come in under the prayer for *general* relief, which in the bill precedes the request for "writ of injunction." In seeking injunction as a part of final relief only the "issuance of a writ of injunction" is not asked. As final relief a *writ* of injunction does not issue. The decree is put in execution by service of copy with order to obey decree. It is further manifest that an injunction *pendente lite* was meant from the fact that no order was made granting the "writ," but by a subsequent pleading it is asked that the "staves cut and sold, and the damage done to said lands by the cutting," *be set off against the tax liens on the lands discharged by the defendants to the bills.*

See printed record, p. 13.

Hence it is clear that so much of the decree as enjoins the the appellant, Leonard, "perpetually from cutting and removing any timber from said lands," if applied to the timber cut and staves made *before* the entry or service of the decree,

which is done in the decree limiting the operation of the "appeal bond," was made under the prayer for general relief.

See printed record, pp. 24 and 25.

There may be some difficulty in seeing how the judge below could conceive the propriety of incorporating in a decree removing clouds from title on injunction against *future trespass*. But the merits of his final decree for relief in favor of complainants is not now under consideration. One thing is clear, that it was only as a part of the *final* relief granted that the injunction appears in this record. The complainants in the bills abandoned it in any other aspect. In the language of the distinguished counsel in the Slaughter-house cases and within the meaning of Bryan *vs.* Bates, 12 Allen 213; Nauer *vs.* Thomas, 13 *Id.*, 574; Fleming *vs.* Clarke, 12 *Id.*, 191, and within the recognition of this court in the Slaughter-house cases, the injunction ordered by the decree was an *integral* part of "the *final* sentence" that "determines the ultimate rights of the party" in this cause, *originating* alone with the final determination of "the ultimate rights of the party," and intended by the court below to be an *inseparable* part of his final decree, and certainly as a matter of fact contemporaneous with this final determination of the ultimate right, intended to continue with other parts of decree

But another test that applies the *supersedeas* to this part of the decree as much as to any other part, is found in the admission of the counsel in the Slaughter-house cases and recognized by this court and sustained by the authorities cited. (*supra*) which is in these words:

"This court (*i. e.*, the Supreme Court) can take such measures as may be necessary to preserve the *condition* of things which existed *just prior* to the passing of the final decree in the court below."

10 Wall., 283–'4.

This court decided against the motion for restoration of injunction in the Slaughter-house cases on the ground that

the record showed that the *status quo* existing "just prior to" the final decree of the court from which the appeal was taken had been preserved, and that the court from which appeal had been taken had done nothing since appeal to execute its decree.

What the appellant asks is just this and nothing more. The *status quo* "just prior to the passing of the final decree" was without injunction or restraint on the appellant in the use of the lands in controversy. The injunction or restraint comes alone with the final decree, originating with it. The complainants, seeking decree against appellant, looked to this very use to relieve them of the necessity of paying him the tax liens which he had removed from the lands.

The judge below seemed to think that the case of Hovey *vs.* McDonald, 109 U. S., 150, which is cited by him in his opinion justifying his decree as to the operation of the *supersedeas*, supports him and reaffirms the Slaughter-house cases. It is respectfully submitted that this last case is not in the line of the Slaughter-house cases. It rested on certain peculiarities of judicial administration of the courts in the District of Columbia, from one of which ~~this~~ appeal taken. The injunction was *preliminary* in that case, and was to only continue until *further order* of the court. It was an injunction obtained as auxiliary to preserve a fund until certain rights could be determined. By the terms of the order granting the injunction it *could not* be *extended* beyond the *discretion* of the court granting it. This is the characteristic feature of nearly all preliminary injunctions. Hence the *status quo* "just prior to the passing of the final decree in the court below" cannot apply to the *dissolution* of a preliminary injunction, *i. e.*, the preliminary injunction cannot, by appeal, be extended beyond the discretion of the court granting it *when it is limited by the terms of the grant to the further order of the court granting it.* But the *status quo* "just *prior*" to the final decree applies to a preliminary injunction *perpetuated* in the final decree or not *dissolved* by it. The

conditions on which it was granted still continue, *i. e.*, until the further order of the court granting it. These conditions an appeal, of course, cannot abrogate. It is respectfully submitted that the distinctions suggested will reconcile every deliverance made as to the effect of an appeal on *preliminary* injunctions, either dissolved or perpetuated. None of the cases, however, have touched an injunction which is first ordered in a *final* decree as *essential* to meet the prayer of the complainant for special and general relief.

The Slaughter-house cases were put by the counsel who succeeded on the ground that the injunctions dealt with were *preliminary*, perpetuated by final decree in some of the cases, and in others dissolved. They fully recognized the distinction taken in this brief. They contended, also, that the 23d section of Judicary act 1789 recognized that preliminary injunctions should stand, notwithstanding appeal from decree perpetuating them.

10 Wall., 283–'4.

This court did not, in its decision, repudiate or question the distinction of counsel made in these cases, but treated the entire controversy from their standpoint.

It is of the dealing with "*preliminary*" injunctions by the court below in final decree that this court speaks in all the cases when it says that an injunction dissolved is not reinstated by an appeal, and that an injunction granted, or rather perpetuated, is not superseded by an appeal. These injunctions appear as incidental to the main relief sought—as auxiliary or aidful—and for preservation while the rights of the parties litigant are being settled. The distinctions already indicated as to the action of this court in the respective premises of injunctions dissolved and injunctions perpetuated constitute the supporting ground of that action and reconcile all the cases. These distinctions cannot in the nature of things be applied to an injunction incorporated *originally* in a final decree and as a *substantive* part of the relief decreed.

This court has in no case applied to an injunction in the category named the rule acted on in the instances of "preliminary" injunctions dissolved or perpetuated by final decree.

It is therefore respectfully submitted that the injunctive part of the decree in these cases is reached by the appeal, and as much superseded as any other part of the decree, and the order of the circuit court attempting to except this feature of the decree from the operation of the appeal is most irregular and oppressive.* The appellant has the right to have such a direction from this court as will relieve him of the embarrassment, the menace and danger of this irregular action of the judge below.

II.

If, however, legal effect of the appeal is not a supersedure of the injunctive part of the decree, yet appellant may still ask of this court such an order as to the decree pending the appeal as will relieve the appellant of *unnecessary hardship*, and will *secure the rights* of appellees. This power will hardly be denied to this court, especially when the application is for "such measures as may be necessary to preserve the condition of things which existed just prior to the passing of the final decree." This much was conceded by the very able counsel who resisted the motion in the Slaughter-house cases and recognized by this court. The application of appellant does not extend farther. Rule 93 cannot limit the power of this court in the exercise of the discretion invoked by this motion. The grounds on which the motion of appellant should be allowed as just and equitable are as follows:

First. The injunction granted by the decree is in these words so far as the timber on the lands is concerned. After enjoining the defendants to the bills from asserting title under the deeds held void, they are "perpetually enjoined from cutting and removing timber from said lands."

See printed record, p. 24.

*It is likewise insisted that the action of the court below in the orders concerning appeal must be treated on the footing of an attempt to execute the decree finals, which is inhibited after appeal. Otherwise a court appealed from could in orders concerning the appeal effectually execute the decree in face of the appeal.

It is insisted that this part of the injunction is void because *ultra vires*, and at least if not void yet so clearly irregular and oppressive, that this court on having attention called to it would at once relieve appellant against it on bond sufficient to secure the appellees.

(*a.*) This injunction is not prayed for in the bill. The injunction prayed for in the bill, as already shown, was a preliminary one to preserve against waste until the titles of the complainants could be set up and validated. Even this was abandoned as before made manifest. Unless an injunction against waste is prayed for in bill as part of final relief it cannot be decreed. The prayer for general relief does not cover it. General relief only embraces such matters as are either incidental or essential to the relief specifically sought. It cannot be said that an injunction against the "cutting and removing of timber" is either incidental or essential to relief against clouds on title. When this cloud is removed and the title clouded is made perfect before the law the right of an equity court to farther intervene between the parties ceases, the holder of the legal title having ample remedy at law to protect against the inhibited trespasses of cutting and removing timber.

(*b.*) The injunction against cutting and removing timber is at best grossly improvident. For it not only enjoins against a *future* trespass, which the court had no power to do, but in terms it *forever* precludes the appellant from cutting and removing timber from the lands, though he might possess himself of titles better than those of the appellees!

(*c.*) By its terms and necessary construction the injunction relates to the *future* acts of appellant, to acts to be done by him *after* the decree, and not to what he had done before decree. It will not be permitted to have a retroactive application. As already shown in this brief, the appellees preferred not to stop the timber business of the appellant during the pendency of the suit, but to look to this as a relief against an account in favor of the latter for tax liens which he had

discharged. The appellant now seeks also by his motion to be relieved against the application retrospectively of the injunction, which the court has made in the order granting appeal, or rather the order accepting appeal bond.

See printed record, pp. 24–'5.

Not only did the court below in that order refer to the injunction granted in the final decree, which, as stated, was only against the "cutting and removing any timber from said lands," but he *extended* it against "otherwise trespassing on the lands in controversy in suit, or *removing staves or other timber* CUT *thereon.*" Thus in orders concerning the appeal and appeal bond, the judge extends the injunction beyond the terms of the final decree. Not only does he add to *specific* acts of trespass provided against in the future in the final decree (which was only the "cutting and removal of timber"), by adding any other trespass that might be committed in the future, but the restraint is made to embrace what had been done in the past, before the decree had been made, before the titles of the appellant had been decided against.

See Leonard's affidavit, pp. 267–'8. (26-7-8)

The court had no power to do this even in the original decree. Certainly the court had no power by orders concerning the granting of appeals and the acceptance of appeal bonds to *enlarge* the terms of the injunction in the final decree

But it is clear that the injunction ordered did not embrace timber cut or staves made before entry of decree; therefore, as to this part of the motion, it ought to prevail.

Second. The action of the court below as to the staves is so oppressive to the appellant that *ex equo et bono* he should be allowed as in his motion is asked.

(*a.*) The appellees swapped what appellant had done before the ~~finding~~ filing of the bills and what he might do during their pendency with the timber for the tax liens of which the appellant is *admitted* to have relieved the lands. This is the necessary construction of the abandonment by the appellees

* Of course it is to be understood from the context that the "removing any timber" in the final decree is connected with the "cutting" - and refers only to the timber cut after the decree

of the preliminary injunction, and of their amended bill, which latter will be found on page 13 of the printed record. Yet the court below, in its order on the reception of the appeal bonds, forbids the appellant to use the very property which the appellees got the benefit of in exoneration of liability to appellant for the tax liens which he is admitted to have removed!

No account is taken as to the tax liens paid by appellant. but the final decree assumes, as must be understood, that the *timber used* by him up to date of *decree* was sufficient to satisfy what appellant had paid on these tax liens. In other words, the appellees got a credit on these tax liens against the appellant for the timber cut and staves made, which the judge below *warned* the appellant not to remove in his order receiving the appeal bonds! Can anything more unjust and oppressive be conceived of?

(*b.*) In a controversy as to the infringement of a patent, found in 7 Federal Reporter, 96 Fisher *vs.* Hayes, a *preliminary* injunction had been granted; and the court subsequently holding that the defendant's machine was a violation of the patent asserted by complainant, made an *interlocutory* order directing an accounting. The defendant violated the injunction; fine was imposed and warrant of arrest issued. It was suggested, on behalf of the defendant, that the contempt could not be criminal, inasmuch as it grows out of a controversy as to whether the defendant's device was or was not an infringement. Though the decree could not then be appealed, because decree final could not be made until after the account was taken, it was, nevertheless, allowed to defendant to hold up the whole matter of the alleged contempt until the case could be perfected for appeal and the case duly reviewed by the Supreme Court; the defendant, however, giving proper bonds to secure his adversary. This action was taken by the circuit judge under Rule 93 in Equity. The judge, who is now Justice Blatchford, of the Supreme Bench, said:

"These provisions (alluding to Rule 93) for the stay or suspension of the operation of a decree, on giving a bond to secure the rights of the opposite party under the decree, are based on the view that where these rights *can be* secured while a review is pending it is reasonable to give to the party seeking the review the stay or suspension till *the questions* raised or reviewed are decided, provided he gives the security."

The judge of the U. S. court for the eastern district of Arkansas was not imbued with the just, and wise because just, conception of relieving as far as possible parties from loss while the question where the right really is may be pending on appeal. On the contrary, so far from adopting the conservative course of so eminent and learned a judge as Justice Blatchford, he endeavored to make the original decree more oppressive to the appellant, during the pendency of the suit, than was ~~the final decree~~ by its terms. The judge below says in his opinion, attempting to justify his order extending the final decree to timber and staves cut, and made before decree, that to do otherwise than he did he would be in the attitude of *selling the staves* to appellant without the consent of the appellees, and that thereby they would lose the fruit of the decree. Judge Blatchford could have said the same thing in Fisher *vs.* Hayes, *supra*. But such an argument never occurred to this accomplished judge. The counsel for the motion is unable to perceive any force in the position taken by the judge referred to and dismisses it altogether as not inviting argumentative refutation at his hands after the action of Justice Blatchford in Fisher *vs.* Hayes. If after an adjudged contempt of an interlocutory decree *settling* the right against the defendant he could allow the whole matter to be held up on bonds to the successful party until the appeal was disposed of, surely the judge of the U. S. district court for eastern district of Arkansas might have at least *refrained from extending* final decree to include what it did not include, to wit: the timber cut and the staves made

before its entry or service. If it did include it he ought to have followed Fisher *vs.* Hayes, and on bonds allowed the appellants to remove these staves.

The affidavit of appellant so clearly sets forth the facts and the inequity of the order that it is unnecessary to exhibit these in this brief. Reference is made and the attention of the court is called to this affidavit found on pp. 26, 27 and 28 of printed record.

In conclusion, objection may be taken that the final decree was not covered by appeal within ten days and that therefore *supersedeas* does not apply to this answer.

1st. Motion was made during the term to set aside and for leave to answer. If appeal had been taken from the decree, this motion could not have been made, inasmuch as the record would have left that court. In order to allow applications such as was made in this case, which are absolutely necessary and concern the intelligent administration of law, the final decree sought to be vacated or opened must for the purposes of appeal be considered as of the date of the refusal to vacate or open. The necessities of practice require this.

2d. Moreover this objection does not touch the motion of the appellant so far as the same is urged on the grounds not embraced by the technical ~~ground~~ grounds of supersedure. Besides this ground there are so many others of merit on which the appellant may rest this motion, that the appellees can take but little by this objection.

I am informed that it will be urged that the appellant has delayed in this cause and been neglectful, and some deliverance of the judge below will be relied on in support of this. * As to this I refer to the whole record, not the printed excerpts for the motion, from which it will be found that the assumption is utterly without foundation in the facts. It will not be found that the judge below was amiable towards appellant The record will show that the appellees were by no means urgent in prosecuting their suit. They never got in a hurry until the solicitor who had charge of the *manage-*

* What this, if true, has to do with the present motion is not perceived. Appellant is safely in this court — regularly here.

ment of the causes, Col. O. P. Lyles, with whom the opposing counsel corresponded, was prostrated by an illness at the time supposed to be mortal and rendered utterly incapable of knowing what was passing in his business and around him. Then the haste of appellees commenced, and not until then. This haste expended himself in *pro confessos* and final decrees by default. *

It is respectfully submitted that the relief sought by the motion of appellant ought to be granted in whole; if not in whole, at least as to the staves made before the entry or service of decree.

T. W. BROWN,
For Appellant and for motion.

* It is not to be forgotten that the appellant held titles from the same original grantor under whom the appellees claim the State of Arkansas - and that what he did before decree, was done under the protection of his titles.